

D8t6joh1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 BRANDI JOHNSON,

4 Plaintiff,

5 v.

12 CV 4460 (HB)

6 LISA STEIN, ROB CARMONA and  
7 PHIL WEINBERG,

8 Defendants.

-----x

9 New York, N.Y.  
10 August 29, 2013  
9:40 a.m.

11 Before:

12 HON. HAROLD BAER, JR.,

13 District Judge

14 APPEARANCES

15 PHILLIPS & PHILLIPS  
Attorneys for Plaintiff

16 BY: MARJORIE MESIDOR  
ALEX UMANSKY

17 GORDON & REES, LLP  
18 Attorneys for Defendants

19 BY: DIANE KREBS  
KUUKU ANGATE MINNAH-DONKOH

20 Also present: Daphney Guillaume, Esq.  
21  
22  
23  
24  
25

D8t6johl

Charge conference

1 (In robing room)

2 THE COURT: I am sorry I didn't get these to you last  
3 night, but you now have copies of all the charges and there  
4 were a couple of changes in the boilerplate that we did talk  
5 about yesterday pursuant to your concerns. One with the  
6 respect to impeachment on page 10 and the other with respect to  
7 the city human rights law on page 15. I think those are the  
8 only changes or so John tells me. I have Ms. Krebs letter of  
9 August 29th and I am glad to talk about that first or second.  
10 It may be valuable to go through the charges first.

11 MS. KREBS: One question. The other issue that I had  
12 raised yesterday had to do with all parties under the law,  
13 corporations.

14 THE COURT: I think we added something.

15 THE LAW CLERK: It is in the last part, page 25.

16 THE COURT: It's in the end?

17 THE LAW CLERK: Yes.

18 THE COURT: I don't know that we actually got to the  
19 part three of the charge, which is really about the jury, but I  
20 guess it is in there on page 25 and I suppose that that is as  
21 good a place as any. You can do it in both places.

22 MS. KREBS: Your Honor, page 25 in the middle of  
23 damages. I am not sure if that is it.

24 THE COURT: 29.

25 MS. KREBS: Thank you.

D8t6joh1

Charge conference

1 THE COURT: So we're now on 17.

2 I am now on 20 if all of you are with me.

3 MS. KREBS: Sorry, your Honor. I am still reading.

4 THE COURT: I will wait for you.

5 MS. KREBS: Are we going one by one?

6 THE COURT: If you would like to do it one by one,  
7 that is the way I usually do it. But if you have any reason to  
8 do it otherwise, you are welcome to tell me.

9 MS. KREBS: I thought we would read through the whole  
10 thing as we did yesterday and come back with our comments.

11 THE COURT: Whatever strikes your fancy.

12 MS. MESIDOR: Your Honor, may I make a request as a  
13 courtesy? I do not have defendant's letter application. I  
14 just looked on my phone and I looked at the e-mail. The only  
15 attachment that I can see is excerpts from the transcripts, not  
16 the actual letter itself. I don't know whether it is just an  
17 issue with my phone and I was wondering if as a courtesy if I  
18 could have a copy of defendant's letter?

19 THE COURT: That's fine with me. I will be glad to  
20 give you mine it is just that I have some notes on.

21 MS. MESIDOR: Your Honor, my co-counsel can see it on  
22 his phone.

23 THE COURT: Otherwise you can have my hard copy. Just  
24 disregard the notes on the top.

25 MS. MESIDOR: Well, your Honor, I would not to be

D8t6joh1

Charge conference

1 privy to your notes.

2 THE COURT: I want you to do whatever makes you happy.

3 MS. MESIDOR: Thank you, your Honor. I will make due  
4 with mine. Thank you.

5 THE COURT: Let's go, guys. We have half an hour or  
6 thereabouts and I don't want to waste it.

7 MS. KREBS: Yes, your Honor, I am still --

8 THE COURT: I don't care what you are doing.  
9 Any problems on page 18 with the hostile work  
10 environment or 18 or 19.

11 MS. KREBS: Yes, your Honor.

12 MR. UNAMSKY: No, your Honor.

13 MS. KREBS: Yes, your Honor.

14 THE COURT: I will let you go first.

15 MS. KREBS: I thought they said no.

16 MR. UNAMSKY: We have no problems with 17 or 18.

17 THE COURT: I didn't hear that.

18 MR. UNAMSKY: What page are you on?

19 MS. KREBS: Starting on page 17. In number two, that  
20 says "twice," it says "motivated at least in part." I would  
21 like the the words "at least in part" taken out. The law is  
22 that it has to be motivated by the gender, race. I will say in  
23 both charges that were proposed both by plaintiff and defense  
24 went under the hostile work environment prong nobody used "at  
25 least in part." Everybody said motivated by.

D8t6joh1

Charge conference

1 MS. MESIDOR: Your Honor --

2 THE COURT: Don't worry. It is denied.

3 What is next?

4 MS. KREBS: Your Honor indicates on page 18 that there  
5 is an affirmative defense on the defendant's part to  
6 demonstrate that it was nothing more than petty slights or  
7 trivial inconveniences and the standard is first that it is  
8 plaintiff's burden to show that it was more than petty slights  
9 or trivial inconveniences. So it is reversing the burden.

10 THE COURT: Wait a minute. I am reading where it  
11 says, then you turn on the middle, almost of the middle to the  
12 defendants affirmative defenses to which the defendants have  
13 burden of proof, right?

14 MS. KREBS: That is right. Let me read the language.  
15 It says, "The defendants' affirmative defenses in substance are  
16 that the unwanted treatment complained of by the plaintiff  
17 consists of nothing more than what a reasonable victim of  
18 discrimination would considerable petty slights or trivial  
19 inconveniences." I am just going to that piece of it.

20 THE COURT: Yes.

21 MS. KREBS: It is actually the plaintiff's initial  
22 burden to prove not only that the conduct is unwelcome but that  
23 it rises to the level beyond petty slights and inconveniences.  
24 By indicating that it is defendants' burden to show it wasn't  
25 at that level, that reverses the burden of proof.

D8t6joh1

Charge conference

1           THE COURT: Wait a minute. Let me just read it again.  
2 It is your burden of proof, right, to prove the affirmative  
3 defense? Isn't that what an affirmative defense is about?

4           MS. KREBS: It would be our burden of proof, yes, your  
5 Honor, if that was the affirmative defense. But, in fact, what  
6 I am saying, your Honor, is that the requirement to demonstrate  
7 that it is above a petty slight or trivial inconvenience is  
8 part of the -- incorporated into the demonstration that  
9 something is unwelcomed, which is part of the initial burden of  
10 proof on plaintiff.

11          MS. MESIDOR: No.

12          THE COURT: Yes.

13          MS. MESIDOR: I agree in part and disagree in part.  
14 The portion that I disagree with is the petty slight or trivial  
15 inconvenience is the standard that must be met to determine  
16 whether there is a hostile work environment. I agree with  
17 that. What I do not agree is that portion as part of the  
18 elements of it being unwelcomed. It is not part of an element  
19 that plaintiff has to prove in terms of it being unwelcomed.  
20 The petty slights and trivial inconvenience is the standard by  
21 which the -- it is the objective standard by which the juror  
22 must look at what was done or said and ask was this a joke, was  
23 it light, was it petty.

24          THE COURT: That is what I thought I was trying to get  
25 across.

D8t6joh1

Charge conference

1 MS. MESIDOR: Right. But I believe counsel is correct  
2 in that that it is not an affirmative defense. It is just a  
3 bar in which that needs to be proven to say that it was indeed  
4 a hostile work environment.

5 MS. KREBS: So I guess, your Honor --

6 THE COURT: I don't think so.

7 MS. KREBS: Your Honor, may I speak?

8 THE COURT: That Williams case seems to say it is an  
9 affirmative defense and that is what I was looking at. I may  
10 have brought it with me. No, I didn't.

11 MS. KREBS: May I respond?

12 MS. MESIDOR: Your Honor, you are correct that  
13 Williams does say that. That is true. I am very familiar with  
14 the Williams case. Williams does indeed say that. It is  
15 something we use all the time. I will leave it there.

16 MS. KREBS: However, again it has always been, and I  
17 am sorry I don't have the Williams case in front of me right  
18 now, but that in order to prove the plaintiff's case again it  
19 is not merely that it is unwelcomed. This, let's call it,  
20 petty-slight-trivial-inconvenience level is for lack of a  
21 better metaphor the counterpart to the severe evasive  
22 obligation that is under the federal law, which again is part  
23 of the plaintiff's initial case. It not only the demonstration  
24 not only that it was unwelcomed but objectively the level was  
25 such that it rises in some fashion to the level of being

D8t6joh1

Charge conference

1 considered a hostile work environment on the law.

2 THE COURT: Denied. Let's go.

3 What's next.

4 Discriminatory termination.

5 MS. KREBS: Yes, your Honor.

6 THE COURT: I don't want to make this only more  
7 confusing for the jury. I assume I can use some of that  
8 language in this here and it wouldn't cause any nobody any  
9 problem, but it seems like it would cause the jury some concern  
10 and I think this does it enough.

11 MS. MESIDOR: We have no issue with either 20 or 21.

12 THE COURT: Well, what about you?

13 MS. KREBS: Yes, your Honor. In the first paragraph  
14 on page 20 where you discuss motivating factor, you then  
15 describe it by saying in the last sentence of that first  
16 paragraph that plaintiff must prove by a preponderance of the  
17 evidence that conscious consideration of her race or gender  
18 played at least some part in the decision to terminate her. It  
19 is the "at least some part" provision that I have objection to.

20 THE COURT: That is the law.

21 MS. KREBS: Well, I will just say even in plaintiff's  
22 proposed charges when they defined motivated or motivating  
23 factor, they defined it as either but for the race or the  
24 gender it would not have occurred or that that was the factor  
25 that made a difference in the decision. That is a different



D8t6joh1

Charge conference

1 level than at least some part.

2 MS. MESIDOR: Your Honor, that language is consistent  
3 with your prior instruction. It is at least some part is the  
4 same -- that is the same consideration that was given in the  
5 prior instruction in regard to --

6 THE COURT: You know what they say about consistency?  
7 So I don't know mind changing both. It is just that I think  
8 this does reflect my understanding of the law.

9 MS. MESIDOR: That is a reflection of the law. It  
10 does say at least some part. In terms of what is a motivating  
11 factor, there are different ways that it has been defined but  
12 at least some part is consistent with the law.

13 MS. KREBS: Your Honor, respectfully that would infer  
14 to the jury that they can actually look at a lesser level that  
15 is required by the law. It is more important than just it had  
16 some part. It is either a but for or it was the factor that  
17 may help them make the decision.

18 THE COURT: "A factor" is the same as "some part."

19 MS. KREBS: No, "the factor."

20 THE COURT: Oh, "the factor."

21 MS. KREBS: That made a difference in the decision.

22 MS. MESIDOR: No. That is not the law. What  
23 plaintiff's counsel is talking about is a mixed motive theory  
24 and it is the mixed motive theory that indicates it must be the  
25 factor, the catalyst, the true factor where other things could

D8t6joh1

Charge conference

1 be considered but this was the quote/unquote game changer.

2 This is not mixed motive, your Honor.

3 MS. KREBS: I will say that they were not discussing  
4 mixed motive. They were talking about motivating factor,  
5 regular burden of proof. Again, I think it lessens the jury's  
6 responsibility.

7 THE COURT: "No factor" would certainly make a big  
8 difference and certainly not the law. "No motive" would  
9 certainly not be the law. So this is "some motive" or some  
10 part of "the decision." I don't know what you would put in. I  
11 know what you would like to put in. I would like to know what  
12 you would put in.

13 MS. KREBS: As I said I actually went back like I said  
14 to plaintiff's charge to just to look at their language so I  
15 could pick language that they had already approved and the  
16 language that they wrote was that in defining what motivating  
17 factor means but for the plaintiff's race or gender they  
18 wouldn't have terminated her or it was the factor that made a  
19 difference in the decision to terminate.

20 THE COURT: I think that is what this says. It is a  
21 factor or in some part is a factor that made a difference in  
22 the decision to terminate her.

23 MS. KREBS: Again, your Honor, if you believe that it  
24 is the same, then I would request to change to my language.

25 THE COURT: You want me to put in was "a factor"?

D8t6joh1

Charge conference

1 MS. KREBS: Instead of saying at least played some  
2 part --

3 THE COURT: No. I am give you a choice. Do you want  
4 me to put in "a factor" instead of "some part"?

5 MS. KREBS: I would like "a factor that made a  
6 difference in the decision to terminate."

7 MS. MESIDOR: No, your Honor. That changes the  
8 standard.

9 MS. KREBS: I am taking the language --

10 MS. MESIDOR: Well, your Honor --

11 THE COURT: She wants to retreat.

12 MR. UNAMSKY: The plaintiff is not the Second Circuit  
13 here. The law is the law.

14 MS. MESIDOR: Even if both parties had agreed that  
15 there was a different standard, it wouldn't be bound upon the  
16 Court. It wouldn't make it any less reversible on any appeal.  
17 The fact that the parties agree is of no consequence. The law  
18 is the law.

19 MS. KREBS: Again, I don't believe that it is an  
20 incorrect statement of the law to say that it was a factor that  
21 that made a difference in the decision to terminate.

22 THE COURT: I have an hour and three quarters  
23 listening to you. I will think about it. I will put it down  
24 with your preferred language. I agree with plaintiff at her  
25 current thinking that this is really a statement which the law

D8t6joh1

Charge conference

1 respects, we'll say. A factor that made a difference -- I will  
2 be glad to think about all during your summation if I can  
3 control myself from listening for a moment -- that made a  
4 difference.

5 MS. KREBS: It is going to be riveting, your Honor.

6 THE COURT: If I really saw the difference -- I guess  
7 I can see a difference. A factor that made a difference.  
8 Well, let me think about it.

9 MS. KREBS: Okay.

10 THE COURT: Anything else on 20 or 21?

11 MS. KREBS: Yes. One other thing on page 21, your  
12 Honor. At the top of the page it was the continuation from the  
13 paragraph at the bottom of the last page. You state that, "If  
14 the jury determines that the reason was pretextual, that it  
15 wasn't the real reason for the decision, that they may infer it  
16 was made up to conceal gender or race discrimination," I would  
17 also ask for a countervailing instruction that they can also  
18 conclude that even if it wasn't the real reason, the real  
19 reason was a different reason that also was not discriminatory.

20 MS. MESIDOR: No, your Honor. That is completely  
21 contradictory to the law. If you give me 15 minutes, your  
22 Honor, there is case law that specifically says that if defense  
23 gives a specific reason for termination and later switched,  
24 that in and of itself can infer discrimination. So to give the  
25 jury an instruction that defendants can put one reason before

D8t6joh1

Charge conference

1 the jury but then that they can consider another reason, not  
2 the actual articulated reason, your Honor, that would be  
3 clearly contradictory to the law and dually prejudicial to  
4 plaintiff.

5 MS. KREBS: Your Honor, I think Ms. Mesidor is  
6 misconstruing my request. I am not talking about a reason  
7 proposed by defendants that is a switch or different. I am  
8 talking about what the jury is allowed to do in terms of  
9 inferences. The jury is allowed as you have said to infer that  
10 if they decide that the reasons proposed by the defense were  
11 not the real reasons, that it was designed to conceal; but they  
12 also on their own may determine that that is not necessarily  
13 the case, that if even if it wasn't the real reason, the real  
14 reason on their own they have determined they don't think it  
15 was a discriminatory reason for it. By not having the  
16 countervailing point there and by only saying this direction,  
17 it has the impact of almost instructing them that if you find  
18 that it was not true then it almost leads to almost  
19 indisputable to the conclusion that the real reason was the  
20 discriminatory reason, was the race or gender discrimination.  
21 I want to make sure it is clear that that is not required. It  
22 can go either way. It can determine that it was false and the  
23 reason was the discrimination or they can determine that it was  
24 false but they don't think the real reason was discrimination.

25 MS. MESIDOR: That is why the word says "you may

D8t6joh1

Charge conference

1 infer" not that "you must infer."

2 Please allow me to finish.

3 MS. KREBS: I thought you were done.

4 MS. MESIDOR: When the instruction says you may infer,  
5 that means that they could go in one way in which they find it  
6 was done to conceal the gender or race discrimination or they  
7 could go in the other way. By indicating that if you find that  
8 the reason that they presented to you which has been  
9 consistently testified to in this case was that there was a  
10 lack of funding for her position and therefore there was no  
11 necessity for it, if you find that that was not the real reason  
12 why you weren't terminated, you could make a determination that  
13 it was concealed. But if you put in the language that  
14 Ms. Krebs is requesting, what you are essentially saying to the  
15 jury is that even if you find that stated reason for her  
16 termination that they had lack of funding was not the real  
17 reason, but you find that they could have fired her because of  
18 poor performance, you can find that there was no concealment of  
19 gender discrimination. That is not the state of the law, your  
20 Honor. That is just another way to do exactly what I indicated  
21 in my first argument, and I will not repeat because I learning  
22 that your Honor doesn't like it --

23 THE COURT: Not me, but the jury doesn't like it.

24 Suppose we changed it so that it read, "Then you may  
25 but need not infer," would that help, Ms. Krebs, make you feel

D8t6joh1

Charge conference

1 like either way either way to go?

2 MS. KREBS: But need not would be much more  
3 acceptable, your Honor.

4 MS. MESIDOR: That's fine with defense, your Honor.

5 THE COURT: Done.

6 Anything on 22 or 23? I gather there is no problem on  
7 22 or 23?

8 MS. KREBS: I do, your Honor. You had indicated that  
9 you wanted plaintiff to go first.

10 MS. MESIDOR: No, your Honor.

11 MS. KREBS: I have only one issue, your Honor. In the  
12 last paragraph on page 22 you indicate that she must have  
13 complained of discrimination based on a reasonable and good  
14 faith belief and then you indicate later down to describe or to  
15 explain that you say what she must prove, however, is that it  
16 was reasonable for her to believe that the underlying conduct  
17 that she holds was unlawful or race discrimination. That is  
18 correct as to the reasonable part but not the good faith part  
19 and I would request there also needs to be something in there  
20 that says, She also must prove that she did actually believe  
21 that there was gender or race discrimination. They are two  
22 different standards.

23 THE COURT: Well, no. I wasn't symmetrical in terms  
24 of the the good faith, but I don't know that we have to go  
25 further. There is something we can add.

D8t6joh1

Charge conference

1           What is plaintiff's view?

2           MS. MESIDOR: Your Honor, requiring that a plaintiff  
3 actually know something is discriminatory, your Honor, there is  
4 some days that I am not even sure what is discriminatory and I  
5 have a JD. To require it that a plaintiff actually know that  
6 something is discriminatory, I don't believe is supported by  
7 any case law even with the heighten standard with the federal  
8 statute. A good-faith belief and a reasonable belief goes with  
9 an objective and subjective standard. So it must be reasonable  
10 in that people looking reasonable people looking at it could  
11 come to the similar conclusion but that she herself believes  
12 that she is experiencing some level of race or gender  
13 discrimination but not that she is required to know that she is  
14 experiencing race and discrimination.

15           THE COURT: I see. I guess you are all on one tack  
16 but I am on another.

17           MS. KREBS: Ms. Mesidor just made my point. I didn't  
18 say, and the record can reflect, that the plaintiff had to  
19 know. I was saying exactly what Ms. Mesidor Sharpe just said,  
20 which is there should be a description in there that says she  
21 had to have a subjective belief that she truly had to believe  
22 that when she was taking that action she was complaining about  
23 discrimination. That is a factor in this case, your Honor.

24           THE COURT: I don't have a problem. I guess I  
25 analogize it to go faith and I didn't use that language in the



D8t6johl

Charge conference

1 last sentence. I only used reasonable.

2 MS. KREBS: Yes. I agree, your Honor. It is just  
3 given the fact that there are two components, the objective and  
4 subjective, since the objective one was defined a little bit  
5 further, I don't know that the way it is written right now that  
6 the jury is going to understand just by the words in that first  
7 sentence in the paragraph, good faith belief there is also a  
8 subjective standard that she had to honestly hold a belief that  
9 she was being subjected to race or gender discrimination. I  
10 want to make it clear to the jury that they have to believe she  
11 really believed that. Quite frankly, your Honor, we believe it  
12 is an issue in this case.

13 MS. MESIDOR: Your Honor, the one protected activity  
14 that everybody agrees with is the draft complaint that was sent  
15 on April 10th, 2012 to defendants. In that draft complaint  
16 that was a complaint that was drafted by Ms. Johnson's  
17 attorneys it says that it is discriminatory. So how defendants  
18 believe that this is an issue --

19 THE COURT: I he don't think it is an issue. I am a  
20 lot simpler than either of you. You are in more rarer  
21 atmosphere. All I am concerned about is that in some sense  
22 what Ms. Krebs says is reflected in the last sentence or the  
23 penultimate sentence, which it now is not, all it says is that  
24 she must prove however is that it was reasonable and I am  
25 saying, and I think she is saying but she is much brighter than

D8t6joh1

Charge conference

1 I am --

2 MS. KREBS: Hardly, your Honor.

3 THE COURT: -- that there really has to be something  
4 in the good faith realm in addition. Now, it can be phrased in  
5 the subjective, but it has to be phrased in some fashion.

6 Do you have in language you would like to tell me?

7 MS. KREBS: Your Honor, I can pull out some language.  
8 I was thinking about adding another sentence after this  
9 sentence that what she also must prove is that from a  
10 subjective standpoint, she truly believed that she was the  
11 victim of race or gender discrimination. That is just off the  
12 cuff. I have haven't pulled that language out. I am not very  
13 artistic.

14 MS. MESIDOR: I don't think it is necessary. We can  
15 put a comma after was reasonable for her to belief, and that  
16 she in fact believed, comma, that the underlying, and the  
17 sentence continues.

18 THE COURT: Well, she in fact believed --

19 MS. MESIDOR: Or that she believed.

20 THE COURT: -- or Ms. Krebs would like truly.

21 Do you think that is okay?

22 MS. MESIDOR: In fact or truly, either one is fine  
23 with plaintiff.

24 THE COURT: That's okay?

25 MS. MESIDOR: Yes, your Honor.

D8t6johl

Charge conference

1 THE COURT: How is that, Ms. Krebs? So it will be  
2 reasonable for her to believe and she in fact truly believed  
3 that the underlying conduct that she opposed was unlawful and  
4 in fact truly believed.

5 Do you want me to read it back?

6 MS. KREBS: Would you please, your Honor.

7 THE COURT: It is the penultimate sentence on page 22  
8 and it reads: What she must prove however, is that it was  
9 reasonable for her to believe and in fact she truly believed  
10 that the underlying conduct that she opposed was unlawful  
11 gender or race discrimination.

12 MS. KREBS: Thank you, your Honor.

13 THE COURT: That makes you relatively happy. I don't  
14 want to suggest it makes you fully happy. It goes part of the  
15 way. It takes care of my problem and it is agreeable to the  
16 plaintiffs.

17 MS. MESIDOR: Yes, your Honor.

18 MS. KREBS: That is a good actual summary how it works  
19 all around.

20 THE COURT: Anything else on retaliation? I think the  
21 rest of this is petty pro forma but certainly let's look at  
22 damages. I am more than happy to take your thinking.

23 MS. MESIDOR: Your Honor, we don't have any issue on  
24 page 24. We have a concern on page 25 as it relates to -- it  
25 is the second to last paragraph where you begin "second."

D8t6joh1

Charge conference

1 THE COURT: Yes.

2 MS. MESIDOR: The last sentence says, However whether  
3 there is only limited evidence presented --

4 THE COURT: However, where there is only, yes.

5 MS. MESIDOR: Limited evidence presented of mental  
6 anguish or humiliation, etc., pain and suffering could be  
7 nominal or zero. We wanted a line indicating that however  
8 testimony by the parties is sufficient.

9 THE COURT: It is in here later.

10 MS. MESIDOR: Not as it relates to the mental and  
11 emotional damages because here is my only concern, your Honor,  
12 and perhaps we might be able to figure out another way to  
13 address it other than what I have suggested, my concern is if  
14 you say that if there is limited evidence presented on any  
15 issue that you can decide such then the limited evidence can be  
16 interpreted to mean just one thing. For instance, if we had  
17 evidence, for instance, in this case plaintiff testified how  
18 this affected her how her testimony was corroborated by Ms.  
19 Ortiz, etc., that is two people discussing it and if they  
20 interpret limited evidence to mean a number then they may  
21 believe that it is nominal or zero. But depending on what the  
22 person is actually saying, there is case law that indicates  
23 that the testimony of the plaintiff is sufficient, the  
24 testimony of plaintiff, the coworkers and others may be  
25 sufficient but even plaintiff's testimony alone is sufficient

D8t6joh1

Charge conference

1 for it to be above garden variety emotional distress.

2 THE COURT: I don't argue about that. I just don't  
3 understand why you would come to that conclusion reading this  
4 paragraph.

5 MS. KREBS: May I?

6 MS. MESIDOR: If I could respond to your Honor's  
7 question.

8 THE COURT: It is too exciting here. I don't think I  
9 can handle it. Why don't I hear from the defendant and then  
10 you can respond to everybody.

11 MS. KREBS: There is a specific instruction that your  
12 Honor has given already that I believe we looked at yesterday  
13 that specifically says that when we're talking about the  
14 determination, it is not the quantity of the evidence but the  
15 quality of the evidence that needs to be considered and you  
16 have a whole discussion about how it doesn't matter how many  
17 things, it is just how much you value what the quality of it  
18 is. So that issue has already been addressed by the Court and  
19 the Court has specifically instructing the jury it is not based  
20 on quantity, it is based on quality. So, again, I don't see  
21 how this is of any concern at all because it need to be  
22 understood in the context of your Honor's instruction that you  
23 judge quality not quantity.

24 MS. MESIDOR: Your Honor, my concern is that we  
25 discussed the evidence to be considered on page six. This

D8t6joh1

Charge conference

1 limitation on evidence now is on page 25.

2 THE COURT: There is no limitation.

3 MS. MESIDOR: It says limited.

4 THE COURT: It says where there is only limited  
5 evidence. It doesn't mean that there is only one witness. It  
6 just means that there were 11 witnesses and there was as in  
7 your case no doctor. That could make a difference to them, but  
8 it need not.

9 MS. MESIDOR: Your Honor, to the extent that when I  
10 read it that I have the interpretation, couldn't we make the  
11 argument that a reasonable jury could also make the juror could  
12 make the same interpretations. Our only concern is that the  
13 word "limited" is ambiguous when used in this context, which is  
14 why we wanted to add something to the effect of testimony by a  
15 single witness may be sufficient or something to that effect.

16 THE COURT: I can say again it is not the quantity but  
17 the quality of evidence that counts.

18 MS. MESIDOR: Yes. That's fine.

19 MS. KREBS: Your Honor, I had just jotted down a note  
20 and I thought perhaps you could say however had whether there  
21 is only evidence of limited quality presented rather than  
22 having the separate thing afterwards and restating the rule.  
23 Evidence of limited quality gives that same feeling about all  
24 the extra words.

25 MS. MESIDOR: Your Honor, plaintiff prefers your

D8t6joh1

Charge conference

1 Honor's suggestion.

2 THE COURT: They always do. I will add my thought.  
3 It is just a repetition of what we have done on page six.

4 MS. KREBS: Another alternative, your Honor, is to put  
5 that thought again at the end of everything. One last time as  
6 a reminder. So it is not just specific as to this and that it  
7 is a reminder overall again for the entirety of the case as  
8 opposed to of singling out this one particular category.

9 THE COURT: I am saying it again. It is also on page  
10 six generally.

11 MS. MESIDOR: Right.

12 THE COURT: It doesn't matter how many times you say  
13 it. If you would like me to say it here and again at the end,  
14 I will be glad to say it three times. It is just a little more  
15 breath.

16 MS. KREBS: I am saying, your Honor, if it is supposed  
17 to be a general instruction, putting it very specifically next  
18 to this one category could then be interpreted by a jury.

19 THE COURT: Ms. Krebs, where would you like it best if  
20 we're going to add it? Let's assume we're going to buy the  
21 plaintiff's concern. Where would you put it now?

22 MS. MESIDOR: Your Honor, if I may there is no other  
23 area in the charge where there has been any accusation of  
24 ambiguity. It resolves our concern because you put it next to  
25 what we believe is an ambiguous term. If you put it far away,

D8t6johl

Charge conference

1 it doesn't resolve the ambiguity.

2 THE COURT: In my view it is not deserving to be put  
3 anywhere. If you don't put it where she wants me to put it,  
4 we'll forget it altogether. Those are the choices, but she  
5 hasn't found a place.

6 MS. KREBS: Your Honor, I was thinking perhaps it  
7 would be at the very beginning of the damages section and to  
8 remind the jury that as with the substance of the case with  
9 damages, it is the quality and not quantity that counts. At  
10 the beginning so it is not specific for any one particular  
11 time.

12 THE COURT: Very creative.

13 The end of that paragraph we're going to put again,  
14 Let me remind you it is quality not the quantity of the  
15 credible evidence that counts.

16 (Continued on next page)

17  
18  
19  
20  
21  
22  
23  
24  
25



D8tnjoh2

## Charge Conference

1 THE COURT: OK. What is next?

2 MS. KREBS: Did you have any other issues with  
3 damages?

4 MS. MESIDOR: What pages are we talking about? To the  
5 end?

6 MS. KREBS: Were we just looking at 24 to 26 at this  
7 point, your Honor?

8 THE COURT: Yes. Look at the whole thing.

9 MS. MESIDOR: That was the only issue that we had as  
10 it relates to those pages.

11 MS. KREBS: The only request that I had, your Honor,  
12 with respect to the charge that's 24 through 26 is that there  
13 is no instruction to the jury that they should not presume that  
14 the plaintiff has been damaged, and it is her burden to prove  
15 each element of her damages by the preponderance of the  
16 evidence.

17 Our concern, your Honor, is that, and this does come  
18 up in particularly in the emotional distress context, but I  
19 didn't want to make it specifically about emotional distress, I  
20 just want it general so it doesn't skew anything, is that there  
21 is case law that does indicate that just because there is a  
22 finding of unlawful discrimination doesn't mean that the person  
23 has demonstrated that they have been distressed. And they do  
24 have to prove that aspect of it as well. I just would like  
25 there to be, again not specific to emotional distress, but to

D8tnjoh2

Charge Conference

1 damages, that there is no presumption that if there is a  
2 finding on liability that the person has been damaged and that  
3 must also be proven separately.

4 THE COURT: The last paragraph on 26 seems to talk  
5 about the burden that is the plaintiff's, and it's about  
6 damages. I am not sure how we would make that any more to your  
7 liking.

8 MS. MESIDOR: Your Honor, in addition, on page 24 you  
9 indicate the same thing as well. The second sentence right in  
10 the beginning of the damage section it says, However, you  
11 should not infer that plaintiff is entitled to recover damages  
12 merely because I am instructing you on the element of damages.

13 MS. KREBS: But that, your Honor, is a regular  
14 instruction that just because I am talking to you about damages  
15 doesn't mean that you should find on liability.

16 The concept that I am discussing is somewhat  
17 different. In looking at the last paragraph, when you cited  
18 the sentence the plaintiff must prove the damages she sustained  
19 by a preponderance of the evidence, all I would ask is that in  
20 connection with that sentence there is an indication that you  
21 may not presume that the plaintiff has been damaged merely if  
22 you find on liability, merely if you find that there has been  
23 harassment, discrimination.

24 THE COURT: Let's move along, everybody. That's not  
25 going to happen. That is here embedded and it probably meets

D8tnjoh2

Charge Conference

1 your purposes.

2 I hate to tell you how big a bite you should take  
3 Ms. Krebs. Can we do the balance now of the charges rather  
4 than do one at a time?

5 MS. KREBS: Sure, your Honor. That is why I had asked  
6 for your guidance in the beginning.

7 THE COURT: It seemed clear to me that you preferred  
8 to do it one by one. I assure you that's the only reason I sat  
9 here doing nothing for 20 minutes while you went through all  
10 it.

11 MS. MESIDOR: Your Honor, for plaintiff we do not have  
12 any further issues with the remainder of the charges.

13 THE COURT: I assume we have a jury.

14 Anything else?

15 MS. KREBS: Your Honor, with respect to punitive  
16 damages, we would request that there be some additional  
17 language included with respect to explaining to the jury that  
18 this is a very high level that must be reached in order to  
19 award punitive damages and that it is only appropriate for  
20 especially shocking or offensive misconduct.

21 THE COURT: Malice and reckless disregard doesn't  
22 appeal to you as high?

23 MS. KREBS: Your Honor, I think that it is -- yes,  
24 your Honor, I think it's not sufficient for the purposes of  
25 communicating to the jury the level required for punitive

D8tnjoh2

## Charge Conference

1 damages. It is a much more significant level than anything  
2 else and I -- it is, your Honor.

3 THE COURT: Yes. But I think probably there are very  
4 few areas in which the burden is higher than malice and  
5 recklessness. I mean, if you have another phrase that you  
6 think is more pertinent, let me know.

7 MS. KREBS: Your Honor, at a minimum we would request  
8 that malice and reckless indifference have definitions included  
9 so that it could be further explained to the jury what that  
10 means. Malice could be intentional wrongdoing or an  
11 evil-minded act. That is what actual malice is.

12 THE COURT: We will look at Black's Dictionary and  
13 take out the definitions and see if I like them. If so, we  
14 will put them in.

15 MS. KREBS: Your Honor?

16 THE COURT: Yes.

17 MS. KREBS: I don't believe I saw a no double  
18 recovery.

19 THE COURT: You may not have seen it, but it's here.  
20 At least I saw it.

21 MS. KREBS: I didn't know where it was.

22 THE COURT: There is language about how there's only  
23 one recovery no matter whether you find, for instance, if there  
24 were two theories under which they could collect.

25 THE LAW CLERK: It is page 24.

D8tnjoh2

## Charge Conference

1 MS. KREBS: What page?

2 THE COURT: 24.

3 MS. KREBS: 24. Thank you.

4 THE COURT: Yes.

5 MS. KREBS: OK. Thank you, your Honor.

6 THE COURT: The second full paragraph.

7 MS. KREBS: I have no further issues with respect to  
8 the remainder.

9 I will say, of course, your Honor, I haven't gone back  
10 and looked at the changes that you made in the first, because  
11 we just jumped to the second half.

12 THE COURT: We made those changes, those changes I was  
13 prepared to make. So there are two or three changes here that  
14 we can make and I will be glad to look at any definitions.

15 On the other item that you wrote a letter on, I assume  
16 the plaintiff has now seen the letter?

17 MS. MESIDOR: Yes, your Honor.

18 THE COURT: In addition to the concerns that I voiced  
19 yesterday, and because I think this was the overarching  
20 concern, but may not have been spelled out to your  
21 satisfaction, there is a case I would urge you look at because  
22 I have had admiration for all the magistrate judges, but  
23 probably more than most I have admiration for Francis.

24 If you look at the Gary Lewis case, which is 149  
25 F.R.D. 474, you will see that the test that he prescribes in

D8tnjoh2

Charge Conference

1 great length, probably 20 pages of decision, really makes it  
2 absolutely clear that to let the CEO, Mr. Weinberg, have an  
3 investigative report that would affect essentially not only his  
4 position but certainly the position of the president depending  
5 on how it came out, to say nothing of the prestige and perhaps  
6 the grants of the organization itself, seems like far and away  
7 the kind of evidence that should be excluded.

8 Let me read you just a little bit of that from a  
9 Second Circuit case that was affirmed by the Supreme Court.  
10 "Furthermore, memoranda or reports prepared after an incident  
11 have been held inadmissible where the preparer of the report  
12 knows at the time of making the report that he or she is very  
13 likely in a probable lawsuit relating to that incident to be  
14 charged with wrongdoing as a participant in the incident." As  
15 you know, Mr. Weinberg eventually, if not early on, was a  
16 defendant himself although that doesn't seem to be necessary.

17 "So that he is almost certain when making the  
18 memoranda or report to be affected by a desire to exculpate  
19 himself and to relieve himself and/or his employer of  
20 liability."

21 In any event, the letter is articulate, but the offer  
22 to reopen the case is denied.

23 MS. KREBS: Your Honor, I apologize. There is one  
24 more thing I wanted to address to the Court that your Honor  
25 raised the other day. I wanted to do it outside the jury.

D8tnjoh2

## Charge Conference

1           In connection with the testimony of Maria Ortiz, I had  
2           made an application after the testimony that she gave revealed  
3           that one of the incidents she had testified to was actually not  
4           based on a conversation that she had with Mr. Carmona and  
5           therefore was not based on her personal knowledge.

6           I wanted to revisit that before the case gets handed  
7           to the jury so that we could determine whether or not that  
8           portion of her testimony should be stricken. I have  
9           transcripts here that I can point out the testimony that I was  
10          referring to.

11          THE COURT: Sorry. It's just too little too late. If  
12          you want to give me the language, I will be glad to look at it  
13          on the bench.

14          MS. MESIDOR: Your Honor, if I may?

15          THE COURT: Do you have it? Do you have a copy?

16          MS. MESIDOR: Do I have a copy of the transcript? I  
17          do have a copy of the transcript. Yes, sir.

18          THE COURT: Yes.

19          MS. MESIDOR: What I was saying is that, is that what  
20          we would disagree with is Ms. Krebs' conclusion that it is not  
21          based on her personal knowledge. She knew what happened with  
22          the male participant because she was there. That's what the  
23          basis of her personal knowledge was.

24          The question that preceded it was how did the  
25          treatment of one female participant compare to the treatment of

D8tnjoh2

Charge Conference

1 another male participant, and she highlighted a conversation  
2 that she had with Mr. Carmona regarding how to handle a female  
3 participant and recalling what she witnessed what happened with  
4 a male participant.

5 So any application that any part of her testimony  
6 should be stricken because it was not based on her personal  
7 knowledge in that respect we would submit to your Honor should  
8 be denied.

9 THE COURT: OK. If you let me look at it, I will be  
10 glad to make a decision before the end of the day.

11 (Continued on next page)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



D8tnjoh2

## Charge Conference

1 (In open court)

2 MS. KREBS: Your Honor.

3 THE COURT: Bring in the jury.

4 MS. KREBS: Your Honor, may I ask you one question?

5 THE DEPUTY CLERK: Jury entering.

6 (Jury present)

7 THE COURT: Good morning, everybody. I think we have  
8 concluded the charging conference in two or three phases, but  
9 we are concluded, so we're ready for the summations.

10 The way that works in civil cases for sure is that the  
11 plaintiff with the burden of proof goes last. Ergo, the  
12 defendant goes first.

13 So we're ready, Ms. Krebs or whomever is going to sum  
14 up, we're ready for defendants' summation.

15 MR. MINNAH-DONKOH: Thank you, your Honor.

16 Good morning, members of the jury.

17 Now, at the beginning of this trial, my cocounsel,  
18 Ms. Krebs, told you that this case can be boiled down to one  
19 single concept: No good deed goes unpunished.

20 Well, we have reached the end of this case, and the  
21 evidence has proved that in fact, no good deed goes unpunished.

22 Now, in this case, plaintiff alleges that she was  
23 subjected to a hostile work environment based on her race and  
24 gender and also discriminated against based on her race and  
25 gender.

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 Race and gender. Race and gender.

2 When you go back into the deliberation room to  
3 consider all of the evidence in this case, and to render your  
4 verdict, I want you to ask yourselves, the conduct that  
5 plaintiff complained of and testified to, was any of that  
6 conduct directed towards her based on her race or gender or  
7 motivated by her race or gender?

8 When you ask yourselves those questions, you will come  
9 to the only logical conclusion possible. That is, none of the  
10 conduct that Ms. Johnson complains of was specifically  
11 motivated by her race or her gender.

12 We'll come back to plaintiff's claims in a little bit,  
13 but for now I want to express the honor myself and Ms. Krebs  
14 have to represent our clients in this case, Mr. Carmona,  
15 Mr. Weinberg, Ms. Stein, and STRIVE.

16 You have heard a lot about STRIVE, so I am not going  
17 to go into great detail about what STRIVE does. You know what  
18 STRIVE does.

19 STRIVE is a not-for-profit organization. It does good  
20 things for the community. Plaintiff herself had no choice but  
21 to admit that STRIVE does good things for the community. Our  
22 clients in this case, all three of them, have dedicated their  
23 professional lives to public service and making a real  
24 difference in the lives of individuals every single day.

25 Now let's go back and discuss plaintiff's claims in

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 this case.

2 Let's start with her claim of hostile work environment  
3 based on gender. Now, what's odd is Ms. Johnson has sued both  
4 Mr. Weinberg and Ms. Stein in this case. But Ms. Johnson told  
5 you, she sat right there and looked you in the eye and told you  
6 that neither Mr. Weinberg or Ms. Stein ever made any derogatory  
7 comments towards her, never gave her tough love.

8 But don't take my word for it. I'm going to read her  
9 testimony directly from the trial transcript.

10 "Q. Just to get this out of the way in this case, you sued  
11 Phil Weinberg as an individual defendant?

12 "A. Yes.

13 "Q. Mr. Weinberg never made any derogatory comments to you,  
14 did he?

15 "A. No, he never gave me tough love.

16 "Q. Ms. Stein never made any derogatory comments to you about  
17 your gender, did she?

18 "A. No, she never gave me tough love.

19 "Q. Ms. Stein never made derogatory statements to you about  
20 your race?

21 "A. No. She did not."

22 Well, why are Mr. Weinberg and Ms. Stein sitting here  
23 today as defendants if they never made any derogatory comments  
24 to Ms. Johnson? Why is she dragging them through the mud?

25 We will talk about that a little down the line, but

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 let's focus on Mr. Carmona.

2 You heard a lot of testimony about screaming and  
3 cursing that Ms. Johnson claims she was subjected to by  
4 Mr. Carmona.

5 But what you did not hear, members of the jury, are  
6 any comments made to her specifically based on her gender. You  
7 never heard any testimony about Mr. Carmona calling her words  
8 like bitch. You never heard any testimony about Mr. Carmona  
9 calling her words like slut. You never heard any testimony  
10 about Mr. Carmona calling her a word such as whore. What you  
11 simply heard was that Mr. Carmona yelled and cursed.

12 But you also heard that Mr. Carmona's yelling and  
13 cursing was not limited to women. Mr. Carmona admitted to  
14 you -- he was genuine. He told you about his background, his  
15 criminal background, everything. He was genuine with you. He  
16 told you, yes, I do use profanity in the office. Yes, I do  
17 yell.

18 Phil Weinberg told you that Mr. Carmona does yell and  
19 use profanity in conversations, even with him.

20 Plaintiff herself admitted that Mr. Carmona does use  
21 profanity and yell in conversations with men.

22 If you recall, plaintiff testified about the incident  
23 with Dwayne Hubbard where the auditor was present in the STRIVE  
24 office. She told you that Mr. Carmona pulled Dwayne Hubbard,  
25 an employee who had relapsed, into his office and proceeded to

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 yell and engage in a confrontation with Mr. Hubbard.

2 So it's not disputed that Mr. Carmona does yell and  
3 does curse with both women and men alike. But in this case  
4 Ms. Johnson is alleging that he singled her out because she is  
5 a woman.

6 Well, folks, if there is undisputed evidence that  
7 Mr. Carmona treats both women and men alike, there is no claim  
8 for a hostile work environment based on gender.

9 Knowing that her evidence on this gender-related  
10 hostile work environment is very thin, what does Ms. Johnson  
11 do? She attempts to create a smoke screen by testifying about  
12 a comment Mr. Carmona made during a woman's group about being a  
13 male chauvinist.

14 But what Ms. Johnson and her attorneys did not do was  
15 give you the full context of that conversation. Mr. Carmona  
16 provided you with the full context. He told you about his  
17 upbringing. He told you that in his culture there is a  
18 stereotypical view of a man's role and a woman's role.

19 But he knows better. He knows better because his  
20 single mother who came to this country as an orphan raised both  
21 him and his three siblings in the projects. She picked herself  
22 up from the ground and ultimately retired as an RN. Based on  
23 seeing his own mother raise the four of them by herself,  
24 Mr. Carmona told you that he knows women are just as strong if  
25 not stronger than men are.

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 But you don't have to believe Mr. Carmona's words if  
2 you don't want to. Just take a look at the undisputed  
3 evidence. You heard testimony from April Bland, who works at  
4 STRIVE as the director of programming.

5 You heard testimony from Lisa Stein, the CFO, COO.

6 You heard testimony from Virginia Barr, who's been  
7 with STRIVE since 1998.

8 April Bland has been with STRIVE for approximately 20  
9 years. April Bland told you that her relationship with  
10 Mr. Carmona is good.

11 Ms. Barr told you that her relationship with  
12 Mr. Carmona is great.

13 Then you have Lisa Stein. She was on the executive  
14 committee. She was CFO and COO. If Mr. Carmona is such a  
15 horrible man who does not respect women and thinks women are  
16 below men, I guarantee you, members of the jury, Ms. Stein  
17 would have never been hired to the executive committee at  
18 STRIVE.

19 Also, you heard testimony, and it has not been  
20 disputed by plaintiff certainly, that half of the employees at  
21 STRIVE are women.

22 Again, Mr. Carmona is a cofounder at STRIVE. If  
23 Mr. Carmona harbored any discriminatory or hostile animus  
24 against women, why would he hire women to work for him? Why  
25 would 50 percent of his workforce be comprised of women? It

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 simply does not add up.

2 Ms. Johnson called an individual that she now  
3 supervises and is friends with, Ms. Maria Ortiz, to I guess  
4 support her story that women are treated terribly at STRIVE.

5 Ms. Ortiz told you that she left STRIVE because she  
6 was sick of the abuse. What you did not hear from Ms. Ortiz's  
7 mouth was that she was sick of abuse because of her gender.  
8 That specifically never came out. Ms. Johnson's attorneys  
9 never asked that question because they knew what the answer  
10 would be.

11 To the extent Ms. Ortiz in her mind felt abused, she  
12 knew it had nothing to do with her gender or her race.

13 Now, let's talk about Ms. Johnson's claim of hostile  
14 work environment based on her race. We all know what the basis  
15 for her claim is, the one conversation where Mr. Carmona did  
16 use the word nigger.

17 Now, Ms. Johnson told you that in the 26 months that  
18 she worked for STRIVE that one conversation was the only time  
19 Mr. Carmona used the word nigger or said that she acted like a  
20 nigger. Again, you don't have to take my word for it. I will  
21 read you the trial transcript.

22 "Q. And as you -- as you testified on direct, the one and only  
23 time in your two-year employment with STRIVE that Mr. Carmona  
24 used the word nigger in conversations with you or called you a  
25 nigger was in a tape recording that was played for the jury

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 early on?

2 "A. Yes. That's the only time he called me a nigger, yes. It  
3 was three times in that conversation but that was the one and  
4 only time."

5 Now Ms. Johnson told you or wants you to believe that  
6 starting just 30 days after she started working for STRIVE  
7 Mr. Carmona started to harass her.

8 Well, members of the jury, if Mr. Carmona himself  
9 identifies as a black man of Puerto Rican descent, harbored any  
10 discriminatory animus or animosity against Ms. Johnson simply  
11 because she was black, I guarantee you there would have been  
12 more than one just one occasion on which Mr. Carmona referred  
13 to her in racial, or what Ms. Johnson wants you to believe is a  
14 racially derogatory word, but in this case there is one time.

15 What Ms. Johnson wants to do is isolate the word  
16 nigger as it was used by Mr. Carmona during that conversation  
17 and forget about everything else that was said during the  
18 conversation. She doesn't want you to put it into context.

19 But you all heard the audiotapes. You have the  
20 transcript in front of you. Mr. Carmona told her, he  
21 specifically mentioned the word, and I don't mean the word  
22 nigger derogatory.

23 He told her, You and Leticia are both smart as shit.  
24 And if you ever get ahold of yourselves, you can rise to the  
25 top.



D8tnjoh2

Summation - Mr. Minnah-Donkoh

1           If this is a man, a black Hispanic man who harbors  
2 racial or any animus against Ms. Johnson because she is black,  
3 why would he be telling her that you can rise to the top if you  
4 simply get ahold of yourself?

5           It simply does not add up.

6           Ms. Johnson, and you can request to see any piece of  
7 evidence that has come in during this trial when you go back to  
8 deliberate. You can listen to the audiotape for yourselves.  
9 Ms. Johnson was not offended by Mr. Carmona's use of the word  
10 nigger or telling her that she acted like a nigger. Ms.  
11 Johnson was offended by the fact that Mr. Carmona compared her  
12 to Leticia Thomas. As you all heard, the day before Leticia  
13 Thomas had come into the STRIVE office wearing attire that  
14 appeared to resemble club attire.

15           Ms. Johnson was not offended by the use of that word  
16 even though she will now have you believe that.

17           To prove that point let's take a look at Ms. Johnson's  
18 testimony during this trial. Ms. Johnson sat right there in  
19 that stand, looked you in the eye and lied to you, and told you  
20 that she had never used the word nigger in the workplace.

21           It was not part of her vocabulary. She sat right  
22 there looked you in the eye and lied to you.

23           But again let's look at her trial testimony.

24 "Q. You have used the word nigger on several occasions while  
25 employed at STRIVE, correct?

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 "A. Incorrect."

2 But before we get to the evidence that shows, that  
3 utterly disproves the lie that she told you, let's take a look  
4 at the witnesses that Ms. Johnson put on the stand.

5 She put on Maria Ortiz, Cammie Crawford, Jamar Cooks.

6 You were all here during their testimony. At any time  
7 did plaintiff's attorney Ms. Mesidor corroborate her own  
8 client's testimony about whether she had never used the word  
9 nigger?

10 No, she did not. That question was never asked of  
11 Ms. Ortiz, it was never asked of Mr. Cooks, and it was never  
12 asked of Ms. Crawford.

13 You know why it was never asked, because they know the  
14 answer. Even though she sat up there and lied to you, they  
15 know the answer.

16 But you heard contrary testimony. You heard from  
17 Mr. Carmona that Ms. Johnson would use the word nigger  
18 frequently.

19 You heard testimony from Ms. Barr, an elderly woman,  
20 who told you that on one occasion she went to ask or she would  
21 regularly ask Ms. Johnson how her children were doing.

22 And how does Ms. Johnson respond on one occasion?  
23 "That little nigger. He's all right."

24 You heard testimony from April Bland. She told you  
25 that in conversations in the office with Ms. Johnson the word

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 nigger was used.

2 Despite that fact, Ms. Johnson not only lied to you  
3 about never using the word, but expects you to believe that she  
4 was somehow so offended by Mr. Carmona's use of that word  
5 during that one conversation in her 26 months at work at  
6 STRIVE.

7 Members of the jury, it simply does not add up.

8 Just as with her hostile work environment based on  
9 gender, as I already read to you, she's admitted that  
10 Mr. Weinberg and Ms. Stein never made any comments to her that  
11 she perceived to be derogatory.

12 So, again, why are Mr. Weinberg and Ms. Stein sitting  
13 here today, being taken away from their duties helping folks,  
14 the folks that they help every day?

15 Now, just to sort of discuss her hostile work  
16 environment claim based on race and gender together. You heard  
17 testimony from Ms. Stein that sometime in 2011 Ms. Johnson came  
18 to her and said she was tired of working at STRIVE and that she  
19 had different job opportunities.

20 Well, members of the jury, if STRIVE was such a  
21 horrible place for her to work, if STRIVE was such a horrible  
22 place for her to work as a black woman, why did she come back  
23 if she had other job opportunities?

24 Again, it simply does not make sense.

25 Further evidence that Ms. Johnson's claims don't make

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 sense is the e-mail that you saw, the e-mail from February  
2 2012, which is in evidence.

3 MS. MESIDOR: Objection.

4 That e-mail was specifically not in evidence, your  
5 Honor. It was marked inadmissible, and we would move to strike  
6 any portion of defense counsel's summation that refers to that  
7 exhibit because it was deemed inadmissible by your Honor.

8 MR. MINNAH-DONKOH: Your Honor, we have the exhibit  
9 sheet. It was specifically allowed into evidence on the  
10 defense exhibit sheet and the was used during the trial.

11 THE COURT: Very well.

12 We'll worry about it after the summation. As I  
13 instructed you both, better if we reserve any objections to  
14 until the end of the summations because it is the only time the  
15 jury actually gets a narrative from each of you as to what the  
16 case really is about in their view and we can put that on the  
17 record at the end just as easily.

18 I also told you once the genie is out of the bottle  
19 it's not going to go put back in in any event. So it's best to  
20 let each of you have an opportunity to tell the jury your view,  
21 and then we can put anything you choose on the record at the  
22 end.

23 MR. MINNAH-DONKOH: Your Honor, as the jury can tell  
24 for themselves, they were provided with copies of this  
25 particular document, so it is in evidence.

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 But, in any event, you were shown Defendant's Exhibit  
2 N, which is an e-mail from Brandi Johnson to Robert Carmona  
3 dated Friday, February 24, 2012. In that e-mail, Ms. Johnson  
4 stated, I need you to critique my admission essay.

5 Now, if Mr. Carmona was so horrible to Ms. Johnson  
6 because of her race and gender and was so horrible to her  
7 starting 30 days after she started working for STRIVE in May of  
8 2010, why almost two years later, in February 2012, is she  
9 asking him for help to critique her essay.

10 She could have gone to someone else to ask for help.  
11 She could have gone to Ms. Stein. Phil Weinberg was the CEO at  
12 that time. She could have gone to Phil Weinberg.

13 No. She chose Mr. Carmona. It is a little  
14 disconcerting that Ms. Johnson will sit up here and again lie  
15 to you that the reason she went to him was because she was so  
16 afraid of him she wanted to get in his good graces. She wanted  
17 to get on his good side.

18 Well, members of the jury, look at the language of  
19 that e-mail. This is not language that someone who is afraid  
20 would use.

21 She does not say in this e-mail, Mr. Carmona, can you  
22 please review my admission essay. She does not say in this  
23 e-mail, Mr. Carmona, can you please do me a favor. She uses  
24 very cavalier language. I need you to critique my admission  
25 essay.

1           Members of the jury, based on that language, it's  
2 clear that Ms. Johnson did not have this fear of Mr. Carmona  
3 that she wants you to believe.

4           Just one last thing on this hostile work environment  
5 claim based on race and gender. Again, at the end of this  
6 case, your Honor will provide you with the law that guides  
7 plaintiff's claims.

8           If you recall, during opening statement, I stood  
9 before you and I told you that the law defines discrimination  
10 as well as hostile work environment in a way that is different  
11 from what your everyday person, a layperson would describe or  
12 characterize discrimination and a hostile work environment.

13           I asked you, can you apply the facts to the law as the  
14 judge gives them to you even if you disagree with the law? And  
15 you all said that you could.

16           Well, members of the jury, I am going to hold you to  
17 that promise.

18           If you fulfill your promise and apply the facts to the  
19 law as the judge gives to you, you will come out with the only  
20 verdict consistent with the facts and with the law, and you  
21 will find that Ms. Johnson was not subjected to a hostile work  
22 environment based on her race or based on her gender.

23           The next claim that Ms. Johnson makes is that she was  
24 subjected to discrimination. Again the judge will instruct you  
25 on not what just the everyday use of the word discrimination

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 means, but what the law says discrimination is. Ms. Johnson,  
2 in order to prove her race and gender discrimination claim, has  
3 to show you that an adverse employment action was taken against  
4 her because of her race and her gender.

5 You will recall when I began my summation I used the  
6 words race and gender several times. Race and gender, race and  
7 gender.

8 To prove her discrimination claim, she has the burden  
9 on all her claims to show you that she was subjected to an  
10 adverse employment action because of her race and gender.

11 Now, in this case, Ms. Johnson claims that the adverse  
12 employment action was her termination. She claims that she was  
13 not aware that the position was tied in any way to the Pathways  
14 Out of Poverty grant. She claims that her termination was  
15 simply because of her race and gender.

16 But, members of the jury, before I get to the actual  
17 nuts and bolts, her claim does not make sense. Again, you have  
18 50 percent of the STRIVE workforce that are women. You heard  
19 testimony that the majority of STRIVE's employees are black or  
20 Hispanic.

21 All the witnesses that Ms. Johnson called on this case  
22 were black. Ms. Ortiz, Cammie Crawford. Jamar Cooks is not an  
23 employee, but Ms. Ortiz was a former employee, and Cammie  
24 Crawford is a current employee. They are all black. They are  
25 all women.

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1           You heard testimony from April Bland, Virginia Barr.  
2           They hadn't been terminated. They are black. They are women.  
3           They still work at STRIVE. Ms. Bland has been there for 20  
4           years. Ms. Barr has been there since 1998.

5           Let's delve a little deeper into another lie that  
6           Ms. Johnson expects to you believe. Which is that her position  
7           was not tied to the Pathways Out of Poverty grant.

8           When you go back into the jury deliberation room, you  
9           can ask to see Plaintiff's Exhibit 40 in evidence.

10           Plaintiff's Exhibit 40 is the January 24, 2012, letter  
11           that was sent by the Department of Labor to STRIVE informing  
12           STRIVE that a no-cost extension of the Pathways Out of Poverty  
13           grant had been extended until June 30, 2012. Now, Ms. Johnson  
14           told you that she worked with Ms. Stein in submitting the  
15           request to the Department of Labor to get this no-cost  
16           extension.

17           Guess what, folks? If you go to the second-to-last  
18           page of Plaintiff's Exhibit 40, there it is. Under personnel,  
19           third line, affiliate services coordinator. On that third line  
20           there are some numbers.

21           I know we have someone who does finance sitting in the  
22           back here in the jury. Numbers don't lie. People can lie.  
23           But numbers don't lie. It is a little early in the morning,  
24           but let's do a little crunching of the numbers.

25           Under affiliate services coordinator on the second to



D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 last page of Plaintiff's Exhibit 40, it says that the original  
2 budget when the grant was initially received was \$130,000.

3 It says in the next column as of September 28 of 2011,  
4 the amount that had been used of that \$130,000 was  
5 approximately \$89,000.

6 In the next column it tells you what the remaining  
7 amount is as of September 28, 2011, which was approximately  
8 \$40,000.

9 And in the next column it shows you the modification  
10 that STRIVE was requesting, the no-cost modification that  
11 STRIVE was requesting, which was approximately \$5,000.

12 If you add the modification, the no-cost increase that  
13 STRIVE was asking for and you add it to the total budget that  
14 it had for that particular position, affiliate services  
15 coordinator, you get a total of \$135,000, \$135,171.49.

16 This is the key number, members of the jury, and you  
17 can do the math yourself if you dispute the crunching that I'm  
18 doing here. This is the key number, \$135,171.49. That's the  
19 key number. That's the total budget for the position.

20 Now we know a couple of things. Ms. Johnson worked  
21 for STRIVE from May 2010 until June 2012. That's 26 months.

22 OK. We know that Ms. Johnson earned salary for the  
23 affiliate services position. The salary for that position was  
24 \$60,000.

25 If you divide \$60,000, or if you divide this total

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 budget of \$135,171.49 by 60 you get approximately 27.1 months.

2 So here we have it, folks. The entire budget covered  
3 27 months, and Ms. Johnson worked 26 months.

4 You may be asking yourselves, Well, what happened to  
5 that one-month difference?

6 Well, if you remember, Ms. Stein told you, that before  
7 Ms. Johnson was hired, there was a lady by the name of Jill  
8 Poklemba. Jill Poklemba was the grant writer. Jill Poklemba,  
9 after she wrote the grant and after STRIVE received the grant  
10 was hired into the position of affiliate services coordinator.  
11 Jill Poklemba worked for STRIVE for approximately a month  
12 thereafter, at which point she left, and Ms. Johnson was hired.  
13 So that one-month difference can be accounted for by Jill  
14 Poklemba.

15 Members of the jury, math does not lie. Although  
16 plaintiff would like you to believe that my clients conjured or  
17 made up this whole elaborate story about what funded her  
18 position, the numbers and the documents don't lie.

19 She told you she helped Ms. Stein submit this very  
20 document, plaintiff's Exhibit 40, but now she expects you to  
21 believe that she had no idea that her position was funded by  
22 the grant. It does not hold any water.

23 Also, she told you that she helped manage the grant.  
24 You saw the job description.

25 Now, Ms. Johnson sat up there and again told you that

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 she never saw the job description that I showed to her. She  
2 tried to separate herself from the Pathways Out of Poverty  
3 grant.

4 That certainly is convenient, because she knows, she  
5 knows that her position was funded by the grant. She knows  
6 that her termination or her separation, however you want to  
7 call it, and I don't like to use the word termination, because  
8 her position simply came to an end. You heard testimony from  
9 Phil Weinberg, from Lisa Stein, there was nothing more for her  
10 to do as of the end of the grant.

11 Plaintiff may get up here and try to tell you or argue  
12 to you that, Oh, well, you know, if the grant was ending on  
13 June 30, why was she let go on June 11.

14 Well, you heard from Mr. Weinberg. Mr. Weinberg told  
15 you that it was his opinion that if there was nothing else left  
16 for her to do with respect to the grant, it was probably best  
17 to give her an opportunity three weeks or so to go look for  
18 another job. What's the point of having her come to work every  
19 day when she can spend that time going to interviews or  
20 whatever the case may be.

21 But, again, you don't have to take Mr. Weinberg's word  
22 for it. You heard the audio recording that we played for you.

23 In that audio recording you heard what Ms. Johnson's  
24 reaction was when Mr. Weinberg told her that her position, as  
25 she knows, was funded by the grant and was coming to an end.

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 "Uh-huh. OK. OK. OK."

2 Now, Ms. Johnson tape recorded that conversation.  
3 That conversation was held on June 11, 2012. Mr. Weinberg told  
4 you that he did not receive the federal complaint for which we  
5 are here today until after he had that conversation with  
6 Ms. Johnson.

7 I want you to understand the difference. STRIVE did  
8 receive an internal complaint from Ms. Johnson's attorneys on  
9 April 11, or April 12 rather of 2012. And then a federal  
10 complaint, an actual lawsuit subsequently came in, in June.

11 Mr. Weinberg told you that that conversation with  
12 Johnson during which he told her that her position was tied to  
13 the grant, was coming to an end, was held before they received  
14 that federal complaint.

15 All this to say that when Ms. Johnson tape recorded  
16 that conversation, she knew she was going to use that recording  
17 as part of her lawsuit. That would have been the best time to  
18 voice her opposition or her surprise that she did not know her  
19 position was tied to the grant.

20 But did we hear any of that? No, we did not.

21 She realized that so now she tries to make up a whole  
22 elaborate story, oh, she never knew and STRIVE never told her.

23 That's another thing that I want to go over with you  
24 folks. Irrespective of whether she knew or whether she didn't,  
25 and we already know that she knew, irrespective of whether she

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 knew or she do not know that her position was funded by the  
2 grant, all my clients have to show you is that her employment  
3 came to an end based on a legitimate nondiscriminatory business  
4 reason and not because of her race or her gender.

5 Again, the proof is in the pudding. The math speaks  
6 for itself. There was no funding left for her position. There  
7 was nothing else for her to do under this Pathways Out of  
8 Poverty grant. It had nothing to do with her race or her  
9 gender.

10 So we've covered the hostile work environment based on  
11 race and gender. We've covered discrimination based on race  
12 and gender.

13 Now let's talk about retaliation.

14 Ms. Johnson testified that after she filed her  
15 complaint or after STRIVE received her complaint in April of  
16 2012 she was isolated, ostracized. But as the evidence  
17 actually showed, that's not really what happened.

18 Mr. Carmona told you that after Ms. Johnson filed her  
19 complaint she would come and perch herself right by his office  
20 and have lunch with Cammie and Lynette, and that they would be  
21 loud, they would be joking, and his office was eight feet  
22 approximately away from where they would be having lunch.

23 After the complaint was received by STRIVE, this  
24 occurred approximately three or four times where Mr. Carmona  
25 never did anything about it.

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1           Then, finally, he got tired of it. He knew what  
2           Ms. Johnson was trying to do. Ms. Johnson was purposely trying  
3           to provoke him, was trying to get a reaction out of him. Why  
4           else would she go into his office and have that conversation  
5           and tape it of him using the N word that one time if she wasn't  
6           trying to elicit some kind of response from him?

7           Ms. Carmona knew exactly what Ms. Johnson was trying  
8           to do. So after a third or fourth time of them perching  
9           outside or her coming to perch herself right outside his  
10          office, what does he do?

11          He tells her, All right, wrap it up. To the extent  
12          you want to have lunch together go in the conference room or go  
13          to the kitchen.

14          It is undisputed that Mr. Carmona never told Cammie  
15          Crawford or Lynette Hall that they could no longer have lunch  
16          with Ms. Johnson. That was never testimony you heard in this  
17          courtroom during this trial.

18          As a matter of fact, you heard that subsequent to  
19          Mr. Carmona telling the three of them to wrap it up or break it  
20          up that the three of them did continue to have lunch but in the  
21          conference room as opposed to right in front of his office.

22          As part of her retaliation claim, obviously  
23          Ms. Johnson also claims that her termination was in retaliation  
24          for her filing of the complaint and that her termination was so  
25          close in time to when she filed the complaint. But, members of

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 the jury, there is nothing STRIVE could have done about when  
2 the grant was ending.

3 The grant was ending in June. So, to the extent she  
4 filed her complaint in or around March or April, STRIVE could  
5 not help her employment ending in June because the grant was  
6 ending, as has already been established.

7 If anyone was retaliating against STRIVE, it was  
8 Ms. Johnson. She knew her employment was going to end, and she  
9 was upset about it. She knew that she had performance issues  
10 that had been constantly documented, and she said to herself,  
11 you know what, I'm going to go out with a bang.

12 That's what happened in this case, members of the  
13 jury. There was absolutely no retaliatory conduct or action  
14 taken against Ms. Johnson because she filed her complaint.

15 This case, it is really a simple case if you boil it  
16 down and think about it. It's a simple case. There is no  
17 liability.

18 She was not subjected to a hostile work environment  
19 based on her race and gender. She was not discriminated  
20 against based on her race and gender. And she was not  
21 terminated or retaliated against based on her race and gender.

22 Now, by all means, some of you and maybe all of you  
23 may think that Mr. Carmona communicated in inappropriate ways  
24 at times or communicates in inappropriate ways in the office.  
25 But, again, I remind you, and I am holding you to your promise

D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 to consider the law as the judge gives it to you.

2 The law is not a civility code. You will hear the  
3 actual substance of the laws that govern Ms. Johnson's claims.  
4 The laws are not a civility code. You can have a boss that you  
5 hate, that screams and yells at you and curses at you. Is that  
6 necessarily condoned? No, maybe not.

7 But as long as the conduct is not specifically  
8 directed at you because of you belonging to a protected class,  
9 such as a black woman, there is no liability.

10 OK. It is a simple case.

11 Now that we discussed the actual claims and the  
12 nonexistence of any liability, I want to briefly talk to you  
13 about damages.

14 Now being that there is no liability in this case, you  
15 should not even have damages in your mind. But I am going to  
16 discuss it to show you another example of just how hollow  
17 Ms. Johnson's claims are.

18 Ms. Johnson was earning \$60,000 a year while she was  
19 employed at STRIVE.

20 She testified that approximately seven months later or  
21 six months later she obtained her current position where she  
22 makes \$50,000. So we are talking about a six- to seven-month  
23 gap during which she is unemployed.

24 During that time period she told you that she received  
25 unemployment insurance benefits. So what are her real damages,



D8tnjoh2

Summation - Mr. Minnah-Donkoh

1 members of the jury? What are her real damages? Let's talk  
2 about her emotional damages.

3 Ms. Johnson told you -- well, the only thing that she  
4 told you was that she felt sad and that was pretty much it.  
5 She felt sad by the conduct that Mr. Carmona allegedly  
6 subjected to her, that she went to see a therapist.

7 Now, members of the jury, if you recall -- actually,  
8 they are right up there still, you have three huge binders of  
9 plaintiff's exhibits. At no point in time during this trial  
10 were you shown any medical psychiatric or therapy notes.

11 If she was as emotionally damaged as she claims, I  
12 guarantee you she would have been showing you medical,  
13 psychiatric or therapy notes.

14 (Continued on next page)

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

D8T6JOH3

Summation - Mr. Donkoh

1 MR. MINNAH-DONKOH: Last, let's talk about punitive  
2 damages. Punitive damages, as the judge will give it to you is  
3 to punish an individual for malice disregard of the law. In  
4 this case, again, based on the facts that there is no liability  
5 and you should not find any liability because no conduct was  
6 directed at Ms. Johnson because of her race or gender.  
7 Punitive damages should not enter your mind nor should any  
8 other damages.

9 We have an organization that does nothing but good  
10 things for the community. You have three individuals, my  
11 clients, who have done nothing but dedicated themselves to help  
12 every day. We heard Mr. Mr. Carmona's personal story. You  
13 heard about him rising from the ground up, picking himself up  
14 from the ground up. He was incarcerated at a young age. He  
15 went to jail while his eight-month-old baby was home. You  
16 heard about him picking himself up, getting an undergraduate  
17 degree, getting a masters in social work from Columbia  
18 University.

19 Now, a lot of people who have had a more privileged,  
20 for lack of a better world, upbringing than Mr. Carmona, cannot  
21 get into Columbia University. Mr. Carmona did. He did it  
22 based on help he received at Daytop, the drug rehabilitation  
23 program. He told you that at Daytop once he overcame his  
24 demons was the "tough low, hard core, I am going told you like  
25 it is" mentality and that is the same ideas that he used when

1 he cofounded STRIVE. Members of the jury, if you have any  
2 shadow of a doubt that Mr. Carmona's system of this "direct, I  
3 am going to tell you how it is" system trying to improve  
4 individuals such as the individuals that STRIVE helps or just  
5 the general organization itself, look no further than the  
6 testimony you heard from Phil Weinberg as your Honor questioned  
7 Mr. Weinberg questioned about the affiliates. You heard  
8 testimony about numerous affiliates in the United States as  
9 well as Israel and united Kingdom who adopted the STRIVE model.

10 Members of the jury, it was in that same vain of this  
11 "tough love, I am going give it to you like it is" theory that  
12 during that conversation with Ms. Johnson he told her, Listen,  
13 you are a bright woman. You can rise to the top. You just  
14 need to get ahold of yourself again. You don't have to take my  
15 word for it. You can listen to the audio recording and read  
16 the transcript. He told her, it is okay to act like a nigga,  
17 but you guys act like niggas all the time. In other words,  
18 your conduct, you allowed yourself to get in your only way.

19 It is not disputed that Mr. Carmona was not the only  
20 one who found issues with the way that Ms. Johnson conducted  
21 herself in the workplace. You have performance evaluations  
22 Ms. Stein, which is Defendant's Exhibit J in evidence.  
23 Defendant's Exhibit J which is the October 21st, 2011  
24 performance evaluation that Lisa Stein wrote specifically  
25 states on the third page under interpersonal relations

1 teamwork, "Brandi shows come passion and personal interest in  
2 her colleagues. However, I have had several conversations with  
3 Brandi regarding her communication style with colleagues and  
4 management. She is often confrontational and emotional in her  
5 initial reactions to a situation where she has a different  
6 opinion.

7 Members of the jury, it is conduct like that that Mr.  
8 Carmona is referring to when he said. It is okay act like a  
9 nigga sometimes, but you guys act like niggas all the time. He  
10 gave the context in which the the word can be used in the black  
11 and Hispanic community. It could be used in a loving way like  
12 Mr. Cameron told you, with your good friends, "That's my  
13 nigga." Or it can be used in a way to show that you are acting  
14 uncouth. Plaintiff herself said he said she was low class.  
15 Mr. Carmona was not saying plaintiff was low class. He said  
16 you act in a way manner that gets in the way of your own  
17 professional aspirations. He was trying to help her. Ms.  
18 Johnson knows that. That is why she reached out to him in  
19 February of 2012 to critique here essay.

20 Members of the jury, at the end of the day, go back to  
21 deliberate again and I want to hold you to your promise, apply  
22 the facts to the law and you will come back with the only  
23 verdict that is consistent. You will find that Ms. Johnson was  
24 not subjected to a hostile work environment based on her race  
25 or gender. You will find that Ms. Johnson was not treated on

D8T6JOH3

Summation - Mr. Donkoh

1 her race or gender and you will find that Ms. Johnson was not  
2 retaliated against based on her complaint.

3 One last thing that I forgot, which I think is  
4 important. During my direct examination of Mr. Weinberg, you  
5 obviously were not given an opportunity to see Mr. Weinberg's  
6 investigation notes, which were quite thorough and detailed,  
7 but he did tell you that an investigation was conducted. So it  
8 is not that STRIVE simply brushed Ms. Johnson aside when she  
9 made a complaint. They conducted a thorough investigation, an  
10 investigation into a complaint that Ms. Johnson had had no  
11 good-faith basis to find that her employment was coming to an  
12 end and she was also going to commence a lawsuit. Again,  
13 please, apply the facts to the law and find in favor of my  
14 clients.

15 Thank you very much for your time in this trial.

16 THE COURT: Plaintiff, if you are ready to sum up.

17 MS. MESIDOR: Yes, your Honor.

18 Is it permissible to move the podium?

19 THE COURT: I think I told you at the outset to move  
20 it where ever you want as long as it is not in the jury box.

21 MS. MESIDOR: Ladies and gentlemen of the jury, I  
22 think over the course of the past three days you have had the  
23 opportunity to meet myself, my colleagues, my client, to meet  
24 defendants and their attorneys and a various amount of  
25 witnesses that we're here to testify in regard to the facts of

1 this particular case. When I opened with you, I told you that  
2 this case was about a failure to take responsibility and that I  
3 would show you throughout the case how the individual  
4 defendants and the corporate defendant STRIVE failed to take  
5 responsibility in this particular case.

6 Now, defense counsel was just before you and gave you  
7 a tidbit of what the law says, but I submit to you, ladies and  
8 gentlemen, and his Honor will do the same, that it is only the  
9 judge who can tell you exactly about the law that is applied in  
10 this particular case. I submit to you that the law that was  
11 quoted just before you has nothing to do with the claims in  
12 this case. This is a hostile work environment case. We're not  
13 saying that the claims in this case are not that every single  
14 black woman at STRIVE was treated exactly the way my client  
15 was. That is not the claim. That is not hostile work  
16 environment. And when the judge reads you what hostile work  
17 environment is, you will see nothing of that sort here.

18 What we are saying is that the comments that my client  
19 was subjected to, the treatment that she was subjected to were  
20 offensive and related to her race or her gender. When you use  
21 the word nigger to an African-American no matter how much  
22 context that you try to quote around it, no matter how many  
23 alternative definitions that you may try to substitute with the  
24 word nigger, if you are an African-American and I call you  
25 nigger, that is no different than calling a Hispanic by the

D8T6JOH3

Summation - Mr. Donkoh

1 worst possible word you can call Hispanic, calling a homosexual  
2 male the worst possible word that you can call a homosexual  
3 male. It was geared toward that person to offend them and any  
4 evidence that defendants put forth to the contrary is simply  
5 ridiculous.

6 They will tell you that STRIVE has a culture of tough  
7 love. I had an opportunity to view STRIVE's website. Yes --

8 MR. MINNAH-DONKOH: Objection, your Honor.

9 THE COURT: Sustained. We're not going to discuss any  
10 of these objections until the end.

11 It is there -- nevermind. I wanted you to go forward  
12 as I wanted him to.

13 MS. MESIDOR: I apologize, ladies and gentlemen. I  
14 will withdraw my last statement.

15 You heard evidence that the tough love rhetoric that  
16 STRIVE touts is for participants. And the reason why they have  
17 tough love for the participants is that many of them were  
18 previously incarcerated, many of them had prior drug-related  
19 issues, many of them did not have what they call the work  
20 culture necessary to acclimate them to a job that they could  
21 hold on for any given period of time. Which demographic does  
22 Brandi Johnson belong to? She was not previously incarcerated.  
23 There was no evidence that she had any prior drug addiction.  
24 Why was she subjected to that tough love? If defendants are  
25 submitting to you that part of that tough love is calling her a

D8T6JOH3

Summation - Mr. Donkoh

1 nigger and that she was dumb as shit, then they are just saying  
2 just discrimination is part of our culture. That is not okay.

3 We sat here for three days and listened to all the  
4 good work that STRIVE is doing. I will not dispute that. You  
5 sat and defendants, each and every one of them, told you about  
6 the level of passion that they have to serve the community.  
7 Where is that passion protected in the handling of  
8 Ms. Johnson's complaint? Where is that passion considered when  
9 you pull a woman who is running a program and managing a  
10 program and you have a conversation with her that completely  
11 demoralizes her to the point where she the bathroom for 45  
12 minutes crying. They will try to suggest to you that she  
13 indicated that she never indicated that she was offended.

14 You have the Exhibit 107 of the transcript. They said  
15 to you that the only thing that she was being offended about  
16 was that she was being compared to this Latesha Thomas. As my  
17 opposing counsel said, documents do not lie and the recording  
18 does not lie. Robert Carmona specifically says, Because both  
19 of you are alike. I am not going to get into this with you.  
20 Go figure it out. Seriously, you guys are alike. Smart as  
21 shit, but dumb as shit. Really. Both of you -- you know what  
22 it is? You know what it is? Both of you are niggers. And you  
23 do. I am not say -- I am not saying using the word derogatory  
24 because sometimes it is know how to act like a nigger, but  
25 y'all act like niggers all the time. That is the last



D8T6JOH3

Summation - Mr. Donkoh

1 statement that he says before Ms. Johnson replies, I am really  
2 offended by that -- I don't think that I do.

3 What is she saying? I don't think that I do. I don't  
4 think that I act like a nigger. And he responds, You can be  
5 offended but it is true. It is true. He insisted that it was  
6 true. He said it as a fact. He even went on to say that every  
7 one at STRIVE would agree with him, that she acted like a  
8 nigger, that she was a nigger. That is not intentional? That  
9 is to build her up to show her love?

10 He gave you different context that people can use the  
11 the word nigger. "That's my nigger" or out of a term of  
12 endearment. She said it was specifically not said it is not  
13 said to be a term of endearment. He said that specifically.  
14 If it is not meant to be a term of endearment and the only  
15 alternative he gave you was that the nigger who beat me up,  
16 then it is a derogatory term.

17 Moreover, STRIVE, as in Exhibit 33, had an  
18 antidiscrimination policy, that is specifically said no racial  
19 slurs. So you have this tough love culture that makes it okay  
20 for you to call him a nigger, but they you have an  
21 antidiscrimination policy that says no racial slurs. That in  
22 effect makes the discrimination policy ineffective. It is  
23 useless, not worth the paper it is written on.

24 Defendants will try to make you believe that  
25 Ms. Johnson walked into the conversation with Mr. Carmona and

D8T6JOH3

Summation - Mr. Donkoh

1     tried to elicit or provoke him in some way so she could have  
2     some good stuff in her bag. You hear the entirety of the tape.  
3     She comes to him before he goes on his four-minute nigger  
4     tirade. The only question she poses to him, So my question for  
5     you is this: First you told me to go with the opposite of how  
6     I feel. Remember? He responds, yeah. So yesterday you said  
7     you and your girl from CWE is just alike. What do you mean?  
8     Carmona opens the box and he goes on. First he says, I am not  
9     going to get into this with you. And then she says, Why did  
10    you compare me -- and then he responds, Because both of you are  
11    alike. The paragraph that I just read to you when he said both  
12    y'all are niggers, that came after, right after that. She  
13    didn't say did you mean we act like niggers. She didn't do any  
14    of those things that sometimes you can hear in recordings that  
15    make you believe that the person is trying to elicit a specific  
16    response. She let Carmona be Rob Carmona and this was the  
17    first time that she recorded him.

18           Mr. Carmona is so used to using the word nigger in the  
19    context that he used it with Ms. Johnson that when asked what  
20    he thought about it, he says it was not in the forefront of his  
21    mind. It was an afterthought. For him it was just Tuesday.  
22    Why is this recording so important? Defendants would have you  
23    devalue this. But when you have testimony from two different  
24    people, oh, the conversation went this way. No, the  
25    conversation went that way. There is room there for

D8T6JOH3

Summation - Mr. Donkoh

1 interpretation. Maybe somebody misinterpreted something.  
2 Maybe this happened. Maybe that happened. But when you have a  
3 recording and an independent witness, it is just what it is.

4 They want you to have it in a larger context of STRIVE  
5 culture. That culture of tough love had nothing to do with  
6 Ms. Johnson or any of the other staffers at STRIVE that were  
7 not formal participants. Ms. Johnson is not a formal  
8 participant. She is an educated whom who maintained her  
9 bachelors degree when she came to STRIVE and she completed her  
10 masters while she was there. Where is it that her life needed  
11 to coming together? Where is it that she be counseled on a  
12 relapse?

13 The hostile work environment claim that we brought  
14 before here was not just based on race but also on gender.  
15 Now, defendants went on in the summation that our evidence on  
16 the issue of gender is very weak. I would submit to you that  
17 it is not. One, Mr. Carmona admitted in saying that black  
18 women have a tendency to get in their way. When asked if he  
19 recalled making the statement, You are the type of woman to  
20 throw a man under the bus, he didn't recall. When asked if he  
21 had made the statement -- when asked if he had ever indicated  
22 that he was a male chauvinist, his initial response is, I have  
23 been saying that for 20 years. Then defendants said, Well, you  
24 didn't put it in context. What he was referring to is the  
25 dynamic between his culture upbringing and being raised by a

1 strong woman that is his mother.

2 Mr. Carmona said a lot more than that. He admitted  
3 that both reside within him. The part of him that believes  
4 that his word is law, that he rules the house, that women are  
5 too emotional exist to him but goes head to head of how he  
6 feels about being raised by his mother. But both are there and  
7 what we're submitting to you is the way that he dealt with Ms.  
8 Johnson was not in the way that brings honor to the memory of  
9 his mother, but is consistent with the part of him that  
10 believes that his word is law, that women are too emotional and  
11 he is not and that he is the head.

12 Now, when we brought Maria Ortiz before you a few days  
13 ago, it wasn't because we wanted to show you that he treated  
14 all the women the same. We just wanted to show you and  
15 corroborate that this is just part of the way that Mr. Carmona  
16 is. It is an example that what Ms. Johnson experienced was not  
17 particularly unique.

18 Now, defendants will say Ms. Ortiz is Ms. Johnson's  
19 subordinate and her friend. That is not something that came  
20 out in cross. I brought that to you. I brought that to you so  
21 that you could see that we're laying our cards out all on the  
22 table. Each one of our witnesses told you about their biases.  
23 Yes, she is my supervisor. Yes, she is is my friend. But she  
24 said that she wasn't going to lie for her and she said that she  
25 has no way of retaliating against her if whatever she said was

D8T6JOH3

Summation - Mr. Donkoh

1 inconsistent. Ms. Ortiz didn't give you elaborate stories that  
2 were completely ridiculous or inconsistent with any of the  
3 independent evidence that we brought to you. She gave you  
4 examples of what she observed as Mr. Carmona treating men and  
5 women differently. She gave you her personal experience.

6 You also heard elaborate testimony and argument that  
7 Ms. Johnson had never made a complaint before. Now, Ms.  
8 Johnson indicated to you that she had complained to Eric  
9 Treworgy when she first got there to STRIVE. In fact, she  
10 recalled to you an instance when Mr. Carmona had spoken to her  
11 in a particular harsh way, the instance when he said you are  
12 the type of woman who will throw the man under a bus, and she  
13 tried to speak to Mr. Treworgy in front of Mr. Carmona. She  
14 asked Mr. Treworgy, Can I speak to you? And Mr. Carmona  
15 responded, No, you fucking can't. Mr. Treworgy said nothing.  
16 They never had an opportunity to speak.

17 Now, if I am a new employee and I am trying to bring a  
18 complaint to a CEO and I say, Mr. CEO, Can I speak to you and  
19 the founder says in response, No, you fucking can't, and the  
20 CEO does nothing, how much power do you really think that I  
21 believe the CEO actually has? So what did Ms. Johnson testify  
22 that she did? She withdrew. Kept her head down, just  
23 continued to work. In response to that, Mr. Carmona took the  
24 opportunity to break her. Stop fucking walking around here  
25 with your fucking head down and do your fucking work.

D8T6JOH3

Summation - Mr. Donkoh

1           Then they indicate to you that she could have  
2       complained to Lisa Stein who was the head of HR. Ms. Johnson  
3       gave you an example in which Mr. Carmona was yelling at her for  
4       closing his fucking door and Ms. Stein walks in and she walks  
5       out. Mr. Carmona himself said, How is Lisa Stein going to  
6       reprimand me? I am her boss. What is the point of complaining  
7       to her then? We're not submitting to you that she didn't  
8       complain. We're just indicating that even if you believed  
9       defendants that she had not complained before that April 2012  
10      draft complaint that it would not have been unreasonable for  
11      her not to.

12           Let's see how they behave after they got the  
13      complaint. After they got the complaint, Mr. Carmona continued  
14      to make life very difficult for Ms. Johnson. He attempted to  
15      isolate her from her colleagues, pulling two colleagues in her  
16      office and telling them, Don't allow yourselves to be used  
17      immediately after asking them to break up the lunch, a practice  
18      that Ms. Crawford indicated to you that they had done many  
19      times before. He tried to isolate her from participants,  
20      pulling Jamark Cooks aside and telling him, Don't come back  
21      here to visit Brandi.

22           Now, defendants will have you believe that the reason  
23      why they said that was because Brandi Johnson has the tendency  
24      to counsel people and that could be counterproductive. Call a  
25      spade a spade. Mr. Jamark Cooks, who doesn't have a dog in

D8T6JOH3

Summation - Mr. Donkoh

1 this fight, told you that Mr. Carmona specifically told him  
2 that the reason I don't want you to come back here and see Ms.  
3 Johnson is because she has an issue with the organization and I  
4 don't want you to get caught up with it. The same issue he is  
5 referencing is the one that he previously testified that Mr.  
6 Weinberg had told him to keep confidential.

7 When Ms. Johnson learns about this, she goes into Lisa  
8 Stein's office, she opens the door, she knocks on the door, she  
9 is told to come in, she opens it and she says to Mr. Weinberg,  
10 I need to speak to you an incident that just involved  
11 Mr. Cooks. Mr. Carmona says, No, you don't and slams the door.  
12 Mr. Weinberg, head of the investigation, does nothing.  
13 Ms. Stein, head of HR, does nothing.

14 Ms. Johnson is so upset that Mr. Weinberg out of his  
15 own mouth testified -- and I don't want you to just take my  
16 word for it -- that she was at a heightened state of anxiety.  
17 She as disturbed that the door was closed like that. She was  
18 very agitated, emotional and fervent, almost hysterical. At  
19 that point it was just too much. How much disrespect do you  
20 have to take before any action is taken? Right after that Mr.  
21 Weinberg comes up with a solution. You are going to work from  
22 home and she does work from home. She works from home from  
23 approximately June 6th to June 11th. She comes in on June 11th  
24 at the request of Mr. Weinberg for the sole purpose of  
25 terminating her on that day.

D8T6JOH3

Summation - Mr. Donkoh

1           Now, why is that day important? People are usually  
2 terminated on a Friday or right before the end of a pay period.  
3 June 11th, 2012 is not a Friday. It is a Monday. Mr. Weinberg  
4 told you why that day. He admitted out of his own mouth that  
5 he learned that the draft complaint was now an official  
6 complaint and had been filed with the court the same day. Now  
7 defense will try to submit to you organization that  
8 conversation took place before we knew that it was actually  
9 filed. Well, this is either the biggest coincidence known to  
10 man, but I think that you can infer that since defendants  
11 already told you that they received the draft complaint that  
12 they had contacted their counsel, that before they decided to  
13 terminate Ms. Johnson, they contacted their counsel too and  
14 that that conversation did not take place after. The  
15 conversation regarding being served with the actual complaint,  
16 did not take place after but before.

17           Defendants spent some time in their summation  
18 discussing why is Mr. Weinberg and Stein here. Ms. Johnson  
19 admitted that they never called her a derogatory term. Ms.  
20 Johnson admitted that they never used any racial slurs to her.  
21 I have to wonder whether that argument seeks to insult your  
22 intelligence. Do they want to present to you that a reason why  
23 Ms. Stein and Mr. Weinberg is here is because plaintiff just  
24 wanted to add additional defendants? Ms. Stein and Mr.  
25 Weinberg are here because they are the executive staff of



D8T6JOH3

Summation - Mr. Donkoh

1 STRIVE. Ms. Stein was the head of HR. Both of them had a duty  
2 and an obligation under STRIVE's own policy that labels them as  
3 the people who you bring discriminatory complaints to to do  
4 something about it and they did nothing. Ms. Stein did nothing  
5 when she saw Mr. Carmona cursing Brandi out about closing his  
6 fucking door. Ms. Stein did nothing when she saw Mr. Carmona  
7 slam the door in Ms. Johnson's face when she tried to bring  
8 another complaint. Mr. Weinberg similarly did nothing.

9 Now, they will say to you but there was an  
10 investigation. Okay. Mr. Weinberg sat in the witness box and  
11 told you that each one of the five complaints that Ms. Johnson  
12 made after the April draft complaint was submitted were  
13 founded. What was the result of their investigation? No  
14 discrimination. When asked why they came to that conclusion,  
15 Mr. Weinberg indicated because Mr. Carmona and Ms. Johnson are  
16 both people of color. Wow. So I suppose then if you have two  
17 people of color having a conversation about the N word they  
18 must also have the same perspective. I am a person of color  
19 and I represent plaintiff. Defense counsel is a person of  
20 color and he represents defendants. We're arguing on opposite  
21 sides. That means people of color can have differing opinions  
22 about the categorization and the use of the N word.

23 They submit to you that Ms. Johnson could not have  
24 been offended by the use of the N the word because she herself  
25 had used the N word and they gave you three witnesses to

D8T6JOH3

Summation - Mr. Donkoh

1 support that fact. Let's look at those three witnesses. First  
2 you had April Bland. Now, Ms. Johnson continues to maintain  
3 that she did not use the N word while working at STRIVE.  
4 However, if I play devil's advocate let's say you believe April  
5 Bland that she used the the word. April Bland specifically  
6 testified that she never called anyone at STRIVE a nigger, that  
7 she never used it in work related conversation, but was having  
8 a personal and private conversation with Ms. Johnson where she  
9 believed that the word was used.

10 Let's look at Ms. Barr. Again, Ms. Johnson still  
11 maintains that she did not use the N the word at STRIVE.  
12 Ms. Barr says that she recalls one instance, okay, that  
13 Ms. Johnson purportedly referred to her seven-year-old son as a  
14 little nigger. Ladies and gentlemen, you have had the  
15 opportunity to observe my client on the witness stand for  
16 several hours. If you believe that she would call her youngest  
17 child a little nigger to a witness who admittedly had very  
18 limited to no interaction with her; two, worked part-time; and  
19 three, has been working at STRIVE for almost 20 years, then I  
20 really don't know what else to say.

21 The last person that seems to corroborate  
22 Ms. Johnson's use of the word nigger is Mr. Carmona. Now, I  
23 sat there while they called my client a liar on a number of  
24 occasions. But I can only recall, and the record will reflect,  
25 two times in which defendant went back to my client's

D8T6JOH3

Summation - Mr. Donkoh

1 deposition to try to show that there was some inconsistency  
2 with what she previously testified to. However, by comparison  
3 in Mr. Carmona's cross-examination, 18 times did we have to go  
4 back to his deposition to remind him of what he said before and  
5 how it is inconsistent with what he is saying now. Another 14  
6 times did we have to reconcile what he told Mr. Weinberg versus  
7 what he told Mr. Rahl. Did he use the N word? Did he not use  
8 the N word. Was it ghetto? Was it low class? At one point I  
9 was sitting at my counsel's table and I was embarrassed for him  
10 taking up so much time on the record page after page because he  
11 can't even remember the lie that he told at deposition to make  
12 it consistent with the lie he is saying at trial.

13 Even if you believe Mr. Carmona that Ms. Johnson used  
14 the N word and to quote him he said she uses the N word like  
15 the word "the" wouldn't he have been able to recall a  
16 particular instance? He couldn't.

17 Furthermore Ms. Johnson is nobody's supervisor, okay.  
18 Ms. Johnson did not sit in her office across the table from a  
19 subordinate and say that you are a nigger or that you act like  
20 a nigger. That did not happen. Furthermore, no one that they  
21 even brought said that they were offended by Ms. Johnson's use  
22 of the word nigger. You have a tape and a transcript that  
23 clearly states that she was.

24 Moving along to the retaliation claim. I already  
25 discussed with you the five instances in which Ms. Johnson says

D8T6JOH3

Summation - Mr. Donkoh

1 that she was retaliated against, isolated from coworkers,  
2 isolated from participants, slammed the door, and now finally  
3 the termination. There is a nuisance here that I think is very  
4 important. Ms. Johnson does not deny that she worked on the  
5 Pathways Out of Property grant. You will find nowhere in her  
6 testimony that she denies it. Ms. Johnson did not deny that  
7 she managed her program. When we brought Exhibit XX, which was  
8 the duties and responsibilities that Ms. Johnson got at her  
9 interview? We brought that for one purpose and one purpose  
10 only. The Pathways Out of Property grant were not part of her  
11 initial duties an responsibilities and the only written job  
12 description that she ever gave her was the one in question.

13 Ms. Stein when asked about this particular job  
14 description says she doesn't recall. However, when we  
15 submitted XX to you, we were able to confirm that unlike  
16 defendants G, XX accurately stated Ms. Johnson's department at  
17 the time of her hire, it accurately stated her supervisor at  
18 the time of hire and her duties and responsibilities. The  
19 issue is not whether Ms. Johnson had an idea or even knowledge  
20 that some or even all of her salary was coming from the fund.  
21 The issue is whether Ms. Johnson was told when the fund ends  
22 your position ends. That is why I asked the question, Did you  
23 ever tell Ms. Johnson that her position was going to end on  
24 January 28th, 2012, the original date, or June 30th, 2012, the  
25 original date. That is why we emphasized the date because as

D8T6JOH3

Summation - Mr. Donkoh

1 defendants themselves admitted, as you will see in Exhibit L,  
2 is that there were several personnel positions that were funded  
3 out of that grant. I am not saying those personnel position  
4 were 100 percent funded out of that grant. But there was a  
5 significant amount allotted for the president, a significant  
6 amount allotted the for the CFO. They indicated that  
7 Ms. Saenz' salary was substantially allotted by that grant.  
8 None of those people got a pay cuts and none of those people's  
9 positions terminated at the end of the grant.

10 So was it reasonable for Ms. Johnson to believe that  
11 even though a portion or all of her salary was part of that  
12 funding that her position would continue? Of course. Nobody  
13 else's position or salary was affected by it in any way. They  
14 found money to supplement that. Nobody got a note in their  
15 paycheck saying, Oh, by the way the Pathways Out of Property  
16 grant has ended and we'll have to reduce your salary by x  
17 amount until we fill your salary up. There was no evidence  
18 that a note like that was presented.

19 Then defendants submitted to you that prior to Ms.  
20 Johnson the affiliates coordinator position didn't even exist,  
21 that this was the first time under this grant that we ever had  
22 such a position. That is what Ms. Stein says. Mr. Carmona  
23 says the affiliated coordinated position always existed. At  
24 first Ms. Stein on her direct says that nobody had the position  
25 before Ms. Johnson. But when I crossed her and I bring out the

D8T6JOH3

Summation - Mr. Donkoh

1 fact that Jill Poklemba was on all the press releases regarding  
2 this grant and I asked her isn't it because she was managing  
3 the grant, she said no. It was because Jill Poklemba wrote the  
4 grant. But what happened on redirect? Who is Jill Poklemba?  
5 Oh, Jill Poklemba had the affiliate's coordinator position  
6 before Ms. Johnson. She only had it for a month and she  
7 resigned and then we hired Ms. Johnson. That was convenient.  
8 It is not the first time that defendants own up to the truth  
9 when they are actually presented with the evidence. You saw it  
10 a number of times with Mr. Carmona. To get Mr. Carmona to own  
11 up to the truth, you either have to impeach him with his  
12 deposition testimony or play him a tape.

13 Ladies and gentlemen, you cannot ignore the fact that  
14 Ms. Johnson was fired on the same day that defendants became  
15 aware that the lawsuit was filed. That is a coincidence that  
16 cannot be ignored and that is an admission by Mr. Weinberg  
17 himself. You cannot ignore that after the draft complaint came  
18 in April all of a sudden Ms. Johnson can't have lunch with her  
19 friends outside of Mr. Carmona's office. He says that was to  
20 provoke him. Ladies and gentlemen, I submit to you it doesn't  
21 take much to provoke Mr. Carmona.

22 After the April complaint, all of a sudden she cannot  
23 speak to participants. There is an issue with Brandi and the  
24 company, don't speak to Brandi. We're slamming doors in her  
25 face. They will continue to say to you, at least try to say to

D8T6JOH3

Summation - Mr. Donkoh

1 you that Mr. Carmona was not Ms. Johnson's supervisor. Because  
2 they know that if these discriminatory actions are done by a  
3 supervisor, it implies that the company is actually doing the  
4 discrimination. Now, now I am not going to instruct you what  
5 to do with information, his Honor will, but that is why they  
6 want to separate Ms. Mr. Carmona from Ms. Johnson. So Mr.  
7 Carmona and Ms. Stein all testified to having reprimanded  
8 Ms. Johnson after she was under Ms. Stein's supervision. At  
9 one point Ms. Stein concocts a story how Carmona saved  
10 Ms. Johnson's job. They are not separating his supervisor  
11 authority or influence then.

12 Then they bring to you this issue of poor performance.  
13 Now, ladies and gentlemen, if there are any smoke and mirrors  
14 in this case, it is this issue of poor performance. Why is it  
15 smoke and mirrors? The stated reason for her termination is  
16 lack of grant funding. So the fact in 2011 you reprimanded her  
17 about improper dress and in 2011 you remanded her about a  
18 matter she was having with her colleague. What does that have  
19 to do with the stated reason why she was terminated was  
20 improper funding? The only reason they are bringing this  
21 information to you is to smear her name. They want to have you  
22 believe she was an unprofessional, hard-to-get-along-with  
23 person that they gave many, many, many chances to but never did  
24 any good any good work ever but was never fired.

25 The theory of their case is no good deed goes

D8T6JOH3

Summation - Mr. Donkoh

1 unpunished. What any evidence of good deeds do we have here?  
2 What is STRIVE's good deeds toward Ms. Johnson? What are Mr.  
3 Carmona's good deeds towards Ms. Johnson. What are Lisa  
4 Stein's good deeds towards Ms. Johnson. What are Mr.  
5 Weinberg's good deeds towards many Johnson? Calling her a  
6 nigger is not a good deed. Watching her be disrespected by a  
7 co-worker is not a good deed. Failing to give her complaint  
8 due consideration and fair chance, not a good deed.

9 They also emphasized to that you that Ms. Johnson  
10 didn't turn over the tapes when Mr. Weinberg was doing his  
11 investigation. Okay. That is true. Mr. Weinberg has heard  
12 the tapes now and so has everybody in this case and as my  
13 co-counsel brought out in the cross of both Mr. Carmona, Mr.  
14 Weinberg, Mr. Carmona is still the face of STRIVE. Mr.  
15 Weinberg was asked that in light of hearing the tapes and all  
16 this testimony, would you change your determination. No. Now,  
17 he will be quick to tell you he is not an attorney and doesn't  
18 know what discrimination is, but he was charged with doing the  
19 investigation and determining whether discrimination took  
20 place. They will try to tell you that he had some assistance  
21 from an attorney, but we also brought out on cross that the  
22 attorney has no experience in employment law or employment  
23 discrimination.

24 THE COURT: Your timing estimate to do your summation  
25 is just about done.



D8T6JOH3

Summation - Mr. Donkoh

1 MS. MESIDOR: Your Honor, I am almost finished.

2 THE COURT: Just a reminder.

3 MS. MESIDOR: Yes, your Honor.

4 Ladies and gentlemen, we showed you evidence that was  
5 brought out in the testimony that Ms. Johnson makes \$60,000 a  
6 year. She was out of work for approximately seven months and  
7 although she has a new job now she earns \$10,000 less than she  
8 did at STRIVE, which means even though she has been able to  
9 close the gap a little, unless she gets her raise or another  
10 higher paying job, she continues to lose money. Emotionally  
11 you heard evidence that over a period of two years Ms. Johnson  
12 was demoralized, berated and made to feel less than a person.  
13 Ms. Ortiz corroborated to seeing Ms. Johnson crying on a number  
14 of occasions, shaking physically and visibly upset, having  
15 headaches. Ms. Stein corroborates seeing Ms. Johnson cry after  
16 an interaction with Mr. Carmona. Even Mr. Weinberg after the  
17 incident of the door slam describes to you in great detail  
18 about her heightened anxiety, her fervent and emotional state,  
19 that she was crying and that she was yelling all to the point  
20 where she had to get therapy. And Ms. Johnson has been going  
21 to therapy that we brought out in evidence through her  
22 testimony since March of 2012, around the same time that the  
23 conversation which Mr. Carmona called her a nigger came out and  
24 has continued to go to therapy at least twice a week to this  
25 day.

D8T6JOH3

Summation - Mr. Donkoh

1           Now, they will tell you that we didn't bring any  
2 medical records, we didn't bring any therapeutic notes or  
3 anything of the sort. If any of you have any experience with  
4 therapy, you will note that when you go to your therapist, your  
5 therapist doesn't give you the notes, the notes that she takes  
6 because the actual patient seeing the note may or may not be  
7 helpful. The therapist' notes is for their own assertion and  
8 their own reflections of how to continue to treat you.

9           In addition, to the compensatory damages of lost pay  
10 and emotional distress that we're seeking, we're also seeking  
11 punitive damages. If you believe that defendants acted either  
12 intentionally or with reckless indifference to Ms. Johnson's  
13 complaints, the use of the word nigger, and otherwise, then  
14 what we're asking you to do is to punish STRIVE and the  
15 individual defendants.

16           No individual defendants in this case is unfamiliar  
17 with STRIVE's antidiscrimination policy, which prohibits the  
18 use of a racial slur and prohibits a hostile work environment.  
19 When Mr. Carmona called Ms. Johnson a nigger eight times in a  
20 single conversation, he knew that it was not a term of  
21 endearment. He knew that nigger is a racial slur. Mr.  
22 Weinberg terminated Ms. Johnson the same day that he learned  
23 that the lawsuit was being filed. He also knew that there was  
24 an anti-retaliation policy and he also knew that that too was  
25 improper. When Ms. Stein in example after example was

D8T6JOH3

Summation - Mr. Donkoh

1 indifferent to what she was actually witnessing was happening  
2 to Ms. Johnson, she too was staying hands off and allowing it  
3 to happen.

4 When all three of these people who are part of the  
5 executive team at STRIVE do this, it is just like STRIVE doing  
6 it. But instead of apologizing, instead of making amends,  
7 instead of having any level of compassion for what the  
8 plaintiff has gone through, they tell you it is just part of  
9 their tough love.

10 (Continued on next page)

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

D8tnjoh4

Summation - Ms. Mesidor

1 Well, if calling a person a nigger and subjecting them  
2 to a hostile work environment is part of STRIVE's tough love,  
3 then STRIVE needs to be reminded that this type of behavior is  
4 illegal and cannot be tolerated. And no matter what kind of  
5 good you may do in the community, you cannot discriminate.

6 Ladies and gentlemen, I thank you for your time. I  
7 thank you for your attention to everything that I have laid out  
8 before you. As my opposing counsel said, if you want any of  
9 the transcript read back to you or you want to see any document  
10 in the evidence or you want to hear any of the recordings, you  
11 can decide to in your deliberation.

12 Most of all, ladies and gentlemen, I thank you for  
13 just the opportunity to lay out Ms. Johnson's case before you.  
14 It has a significance to her that it is perhaps impossible for  
15 you to imagine. To seen have her day in court, where there may  
16 be some justification that what she endured was not in vain,  
17 allows a healing to begin that otherwise she would have not  
18 been able to have.

19 And I thank you for that.

20 THE COURT: Very well. Ladies and gentlemen, your  
21 lunch is here. We will let you go and get it. We will see you  
22 I think probably at about 1:15. I don't think it will take you  
23 any longer even for this lunch. But the case is not yours yet,  
24 so do not discuss it until after you come back and hear my  
25 charge. You are excused.

D8tnjoh4

Summation - Ms. Mesidor

1 (Jury not present)

2 THE COURT: If indeed either of you want to put  
3 objections to the summation on the record, you are perfectly  
4 able to do that now. If you have anything else that we ought  
5 to talk about you can do that, too. I have a hearing in less  
6 in about 25 minutes, so you are going to have to have lunch  
7 very shortly, even though it's earlier than your likely or  
8 usual time for lunch. We will see you back here at 1:15.

9 MS. KREBS: Thank you, your Honor.

10 Your Honor, did you say you want us to deal with any  
11 objections?

12 THE COURT: Right now.

13 MS. KREBS: Right now.

14 Your Honor, there is one thing I want to raise with  
15 respect to opposing counsel's closing remarks. During the  
16 course of Ms. Mesidor-Sharpe's closing arguments she was making  
17 a comparison or a distinction between Ms. Johnson and the other  
18 participants about the fact that they did not, she did not at  
19 all come from a similar background as they did.

20 One of the things she said is that she was not  
21 previously incarcerated. Now, as your Honor knows, there is a  
22 criminal history in this case that was excluded based on  
23 609(b).

24 However, by making that statement, I believe that  
25 opposing counsel has opened the door and created a

D8tnjoh4

Summation - Ms. Mesidor

1 misperception on the record with respect to Ms. Johnson's  
2 history indicating and certainly implying that she had no  
3 criminal history.

4 At this point in time, we ask that the jury be given  
5 judicial notice of the fact that Ms. Johnson had been  
6 previously convicted of grand larceny and for which she paid  
7 restitution for 11 years.

8 THE COURT: \$100,000.

9 MS. KREBS: \$100,000, yes, your Honor.

10 MS. MESIDOR: Your Honor, may I respond. Your Honor  
11 my words were very specific.

12 THE COURT: You can go to the podium or bend over and  
13 use your mic, whatever you would like.

14 MS. MESIDOR: Your Honor, my words were very specific.  
15 She was not previously incarcerated and that she was not a  
16 participant. We were not trying to allude to the jury that she  
17 did not have a criminal background or anything in that regard  
18 at all. All we are saying is that, based on what defendants  
19 indicated was their tough love philosophy with their  
20 participants and their use of that tough love to staffers who  
21 were former participants who needed to get their lives together  
22 or who were suffering a relapse, that was the specific context  
23 in which I raised that she had not been previously  
24 incarcerated, nor was she a former drug addict or had used  
25 illicit drugs in any way.

D8tnjoh4

Summation - Ms. Mesidor

1 I did not open any door because I did not indicate  
2 that she was pristine and she had no criminal record or  
3 anything of the sort. To now bring it out just as judicial  
4 notice that, one, that she was convicted and, two, that she  
5 paid restitution without allowing for me to put her conviction  
6 in context I think would be unduly prejudicial.

7 THE COURT: How would you put her conviction in  
8 context?

9 MS. MESIDOR: I'll let you know, your Honor.

10 THE COURT: That's very kind of you.

11 MS. MESIDOR: Your Honor, my client used to work at  
12 Chase bank. She was only working there for seven days when she  
13 was questioned by management about her till being under. She  
14 found out by management that her supervisor had been taking  
15 money out of her till and putting a code to make up the  
16 difference.

17 Because she didn't know that this was taking place,  
18 when they questioned her, she didn't have a response to them as  
19 to where the money went or what happened. She had only been  
20 working there as a teller for seven days and she did not have  
21 any other significant banking experience.

22 So she was arrested and she was charged and she was  
23 assigned a public defender, and the case dragged on for two  
24 years. When it came to the point of when the prosecution was  
25 offering my client a plea, my client had a two-year-old

D8tnjoh4

Summation - Ms. Mesidor

1 daughter and nobody to look after her, and she and her private  
2 counsel made the decision that she would take the plea so long  
3 as she had no jail time, which is why she took the five years'  
4 probation and paid the restitution for \$100,000.

5 THE COURT: I don't understand. Why didn't her lawyer  
6 investigate so that they got the supervisor?

7 MS. MESIDOR: Your Honor, there was no way for her to  
8 continue to do that with a private attorney. She could not  
9 afford to continue her defense in that regard.

10 THE COURT: Public defenders are as good as most  
11 private lawyers, if not better in my experience.

12 All right. I hear you.

13 MS. MESIDOR: Right. The main point of that is she  
14 had a two-year-old daughter with nobody else to care  
15 information him.

16 THE COURT: I heard that, too. Yes.

17 MS. KREBS: May I respond, your Honor?

18 THE COURT: You may.

19 MS. KREBS: Your Honor, we are not here to retry what  
20 occurs with Ms. Johnson's prior criminal history. The fact is  
21 she had a prior criminal history. The fact is she did plead,  
22 although I still find it hard to believe somebody would take a  
23 plea to repay \$100,000 when they didn't do it, and that somehow  
24 it would not be found or determined that if that \$100,000  
25 happened over a course of time and she was only there for seven



D8tnjoh4

Summation - Ms. Mesidor

1 days that it wouldn't have been determined anyway.

2 Again, putting that aside, we are not here to retry  
3 that case. The fact is she did plead guilty. She was  
4 convicted of grand larceny. She did repay \$100,000. She did  
5 get five years probation. She did repay it over the course of  
6 11 years.

7 If you look at the manner in which opposing counsel  
8 brought it up, used the words "not previously incarcerated" in  
9 the context of her closing remarks, I would ask the Court to  
10 please look through the whole thing. It was a definite  
11 comparison there. Not just specific to incarceration, but it  
12 was a comparison of the lifestyle that she had versus the  
13 lifestyle of a person who had been a participant or former  
14 participant in the program. That created an implication.

15 THE COURT: Why don't I ask the reporter, I don't even  
16 know which whether it was Sam or Jenn, to find that portion and  
17 see if they can provide it to me by 2:15 or 1:15 whenever we  
18 are going to see the jury. I think we have each of your views  
19 and it will take the reporter a little time, so I'm going to  
20 look at it. I am going to let him go and you can go to lunch.

21 MS. KREBS: Thank you, your Honor.

22 MS. MESIDOR: Thank you, your Honor.

23 (Luncheon recess)  
24  
25

D8tnjoh4

Summation - Ms. Mesidor

## A F T E R N O O N      S E S S I O N

(1:20 p.m.)

THE COURT: I am glad to have the jury come by and resolve these two issues with them so we don't waste any time.

You have your leader?

MR. MINNAH-DONKOH: Your Honor, I believe she was on the eighth floor. We are looking for her.

THE COURT: I looked at both of these items, and as long as we have lawyers from both sides, insofar as the item with respect to the summation, there isn't any question but that it was an ill-considered comment, which I suppose the jury could ruminate meant that there was no conviction for Ms. Johnson, but it's really not enough for me to open the case and start all over again, not start all over again, but introduce the conviction that I kept out. It is unfortunate, but I am not about to do what Ms. Krebs sought.

The other item, with respect to Ortiz, once again, there isn't any doubt in my mind nor in the transcript that in fact Ortiz in the first instance was either misled or didn't really know what she was talking about. But then the question was relatively clearly put to her by Ms. Mesidor that in fact -- or maybe it was Ms. Krebs, I don't know, this is cross: The question was asked and answered the question, I didn't have a conversation with Bob Carmona about a participant doing

D8tnjoh4

Summation - Ms. Mesidor

1 that -- which was cock sucking -- I had a conversation with Rob  
2 Carmona in regard to him wanting me to terminate the female  
3 participant.

4 So in essence, what I understood the problem to be was  
5 really resolved on a later question and answer. So I didn't  
6 quite understand what Ms. Krebs was anxious for me to do.

7 Would you know?

8 MR. MINNAH-DONKOH: I do not, your Honor. I have  
9 knowledge regarding the criminal conviction issue, but with  
10 respect to the second issue you just addressed --

11 THE COURT: I am not going to wait for her. I am  
12 going to bring in the jury and we're going to start the charge,  
13 which I will explain. Maybe she will be here by that time, but  
14 I don't want to waste any more time.

15 So, in any event, I don't know what I would do about  
16 that, but it seems to me that it was corrected.

17 (Jury present)

18 THE COURT: Ladies and gentlemen, this is the last  
19 aspect of any civil or criminal trial, and that doesn't mean  
20 that it's unimportant, or at least judges like to think that.  
21 It essentially tells you what the law is.

22 We have had a charging conference which took us  
23 through both the last portion of last evening as well as this  
24 morning, and we have gone over what I suggested and we have  
25 made a couple of changes. I think probably for the most part

d8tnjoh4

## Jury Charge

1 everyone is of the same mind, that this is the law.

2 So you may hear me repeat some of what I said at the  
3 time we had a preliminary charge. The difference is that was  
4 all sort of without any, extemporaneous I guess is the word.  
5 Just to be sure that I don't leave anything out, I am going to  
6 read this to you. It may not be as exciting as my inflection  
7 when we talk extemporaneously, but it will indeed avoid any  
8 error or any errors that I saw when we put this together with  
9 counsel.

10 Now that the evidence in this case has been presented  
11 and the attorneys for the parties have concluded their closing  
12 arguments, it is my responsibility to instruct you as to the  
13 law that governs this case. You must pay close attention, and  
14 I will be as clear as possible.

15 My instructions will be in three parts.

16 All three parts, just so that you know how long it may  
17 take, I think there are less than 35, or indeed 32 pages, and  
18 many of them are not full pages, so it's really 20-odd pages.

19 My instructions will be in three parts.

20 First, I will give you instructions regarding the  
21 general rules that govern a jury in a civil case;

22 Second, I will instruct you as to the legal elements  
23 of the causes or claims here alleged by the plaintiff;

24 Finally, I will give you instructions regarding the  
25 general rules governing your deliberations as jurors.

d8tnjoh4

## Jury Charge

1           It is your responsibility and duty to find the facts  
2 from all the evidence in the case. You are the sole judges of  
3 the facts, not counsel and not I. I want to impress upon you  
4 again the importance of that role.

5           It is for you and you alone to pass upon the weight of  
6 the evidence, to resolve such conflicts as may have appeared in  
7 the evidence, and to draw such inferences as you deem to be  
8 reasonable and warranted from the evidence or lack of evidence,  
9 to resolve such conflicts as may have appeared in the evidence,  
10 and to draw such inferences as you deem to be reasonable and  
11 warranted from the evidence or lack of evidence.

12           With respect to any questions concerning the facts, it  
13 is your recollection of the evidence and yours alone that  
14 controls. Remember, you are the sole and exclusive judges of  
15 the facts. You pass upon the weight of the evidence, you  
16 determine the credibility of the witnesses, you resolve  
17 conflicts as there may be in the testimony, and you draw  
18 whatever reasonable inferences you decide to draw from the  
19 facts as you have determined them.

20           I shall later discuss with you how to think about the  
21 credibility, or believability, of the witnesses. In  
22 determining the facts, you must rely upon your own recollection  
23 of the evidence. Anything that counsel may have said while  
24 questioning witnesses or during arguments is not to be  
25 substituted for your own recollection and evaluation of the

d8tnjoh4

## Jury Charge

1 evidence.

2           With respect to a fact matter, nothing I have said  
3 during the trial or may say during these instructions should be  
4 taken in substitution for your own independent recollection.  
5 Because you are the sole and exclusive judges of the facts, I  
6 do not mean to indicate any opinion as to the facts or what  
7 your verdict should be. Indeed, I have no power to tell you  
8 what your verdict should be. If I allude to a fact and should  
9 your recollection differ from mine, it is your recollection  
10 that governs. I am usually, and indeed in this case, careful  
11 to avoid talking about facts or what I thought facts were just  
12 so that we don't get into that pickle.

13           During the trial, I have been called upon to make  
14 rulings on various questions. Those rulings are not evidence  
15 and need not be considered by you. Procedural matters are  
16 matters of law, and although you may have been curious about  
17 them, you should not consider them. The rulings I have made  
18 during the trial are not any indication of my views of what  
19 your decision should be.

20           I also ask you to draw no inference from the fact that  
21 upon occasion I may have asked questions of certain witnesses.  
22 Such questions were only intended for clarification or to  
23 expedite matters, and certainly were not intended to suggest  
24 any opinions on my part as to the verdict you should render or  
25 whether any of the witnesses may have been more credible than

d8tnjoh4

## Jury Charge

1 any other witnesses. That is your job.

2 Your job is to consider only the evidence and find  
3 facts from what you consider to be the believable evidence and  
4 apply the law as I will later give it to you. Your verdict  
5 will be determined by the conclusions you reach no matter whom  
6 the verdict helps or hurts. Sympathy and speculation should  
7 play no part in your decision.

8 The evidence upon which you are to decide what the  
9 facts are in this case comes from one sworn testimony of  
10 witnesses both on direct and cross-examination -- and I guess  
11 we had some redirect as well -- regardless of who called the  
12 witness, and from exhibits that the Court received in evidence  
13 and from any stipulations or agreements. I don't remember any  
14 stipulations or agreements.

15 (Continued on next page)

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

D8T6JOH5

Charge

1           THE COURT: In any event, let me go on to what is not  
2 evidence. Certain things are not evidence and are to be  
3 discarded in deciding what the facts are. Arguments or  
4 statements by lawyers, including openings and summations  
5 objections to questions, testimony that has been included  
6 stricken or that you have been instructed to discard and  
7 anything you have seen or heard outside the courtroom, all  
8 those things are not evidence.

9           In making a determination, you may consider evidence  
10 that is either direct or circumstantial. Direct evidence is  
11 that to which a witness testifies that the witness has  
12 perceived. Direct evidence may also be in the form of an  
13 exhibit admitted into evidence.

14           Circumstantial evidence is proof of a chain of facts  
15 and circumstances from which other inferences may be drawn.  
16 You are allowed to make reasonable inferences from particular  
17 facts that are established by direct evidence and this is  
18 called circumstantial evidence. The law does not distinguish  
19 between direct and circumstantial evidence. You may give equal  
20 weight to both. The question in the case is whether based upon  
21 all the evidence, both direct and circumstantial, the party  
22 with the burden has proved its case by a preponderance of the  
23 evidence.

24           As a reminder, I gave you an example at the beginning  
25 of the trial to illustrate circumstantial evidence. As you



D8T6JOH5

Charge

1 recall it was about the subway and rain and umbrellas. I will  
2 not doing it again.

3 As you can see or recall, the matter of drawing  
4 inferences from facts in evidence is not a matter of guesswork  
5 for speculation. An inference is a logical, factual conclusion  
6 which you might reasonably draw from other facts that have been  
7 proved. You are permitted to draw inferences but you are not  
8 required to do so and you may do it either are from direct or  
9 circumstantial evidence. In drawing inferences, you should  
10 exercise your common sense. Actually, you should always  
11 exercise your common sense. I will have to change that.

12 Many material facts as a state of mind are rarely  
13 suspectable and proved by direct evidence. Usually such facts  
14 are established by circumstantial evidence. Circumstantial  
15 evidence is of no less value than direct evidence. In either  
16 case, you must be convinced that the party with the burden of  
17 proof has proved its case by a preponderance of the evidence.

18 There are times when different inferences may be drawn  
19 from facts whether they are proved by direct or circumstantial  
20 evidence. Plaintiff may ask you to draw one set of inferences.  
21 The defendant may ask you to draw another. It is for you, and  
22 you alone, to decide what inferences you will draw.

23 You have had the opportunity to observe all the  
24 witnesses. It is now your job to decide how believable each  
25 witness was in his or her testimony. Again, you are the sole

D8T6JOH5

Charge

1 judges of the credibility of each witness and the importance of  
2 his or her testimony. It must be clear to you by now that you  
3 are being called upon to resolve various factual issues in the  
4 face of the different pictures painted by the plaintiff and  
5 defendant which cannot be reconciled without your help. You  
6 have to decide where the truth lies and the vital part of your  
7 decision will involve making judgments about the testimony of  
8 the witnesses you have listened to and observed.

9 In making those judgments, you should carefully  
10 scrutinize all of the testimony of each witness, the  
11 circumstances under which witness testified and any other  
12 matter in evidence which may help you decide what witnesses  
13 were telling you the truth and which witnesses were not and the  
14 importance of each witness's testimony.

15 A witness may be discredited or impeached by  
16 contradictory evidence of other witnesses or by evidence at a  
17 prior time that the witness said or done or done something or  
18 failed to do or say something which is inconsistent with the  
19 witness's testimony on the witness stand. The earlier  
20 contradictory statements are admissible only to impeach the  
21 credibility of the witness and not to establish the truth of  
22 those statements. It is your responsibility to determine the  
23 credibility, if any, to be given the testimony of a witness who  
24 has been impeached. If a witness is showing knowingly to  
25 testify falsely concerning a material matter, you have a right

D8T6JOH5

Charge

1 to distrust that witness's testimony and other particulars and  
2 you may reject all the testimony of that witness or give it  
3 such a credibility as you may think deserves.

4 In evaluating the credibility of the witnesses, you  
5 may take into account that the witness who testified may  
6 benefit in some way from the outcome of this case. Such an  
7 interest in the outcome may sway the witness to testify in a  
8 way that advances his or her own interest. Therefore, if you  
9 find that any witness whose testimony you are considering may  
10 have an interest in the outcome of that case, you should bear  
11 that factor in mind when evaluating that credibility of his or  
12 her testimony.

13 On the other hand, this is not to suggest that every  
14 witness who has an interest in the outcome of a trial will  
15 testify falsely or conversely, that witnesses with no apparent  
16 interest in the case will always tell you the truth. It is for  
17 you to decide to what extent, if at all, the witness's interest  
18 has affected or colored his or her testimony.

19 The law does not require any party to call as  
20 witnesses all persons who may have been present at any time or  
21 place involved in the case or who may appear to have some  
22 knowledge of the matters in issue if it is at the trial. Keep  
23 in mind, too, that with respect to witnesses, they are all  
24 equally available to both sides. Put another way either side  
25 was able to call any witness it chose to call.

D8T6JOH5

Charge

1           Burden of proof. The plaintiff has the burden of  
2 proof and must prove her claim by a preponderance of the  
3 evidence. But the defendants have the burden of proof as to  
4 their affirmative defense, which we'll mention in the fullness  
5 of time and you will see or hear about one of them here. To  
6 establish by a preponderance of the evidence means to prove  
7 that something is more likely so than not so. A preponderance  
8 of the evidence means the greater weight of the evidence. It  
9 refers to the quality and persuasiveness of the evidence,  
10 notice to the number of witnessed or documents.

11           If you find that the credible evidence on an issue is  
12 evenly divided between the parties, that it is equally probable  
13 that one side is right as it is that the other side is right,  
14 then you must decide that issue against the party having the  
15 burden of proof. That is because the party who has the burden  
16 or shoulders the burden of proof must prove more than simple  
17 equality of evidence. That party must prove its claim by a  
18 preponderance of the evidence. Put another way so long as you  
19 find that the scales tip however slightly in favor of the party  
20 that bears the burden of proof that what they claim is more  
21 likely true than not true and the claim will have been proved  
22 by a preponderance of the evidence. In determining whether any  
23 fact has been proved by a preponderance of the evidence of the  
24 credible evidence in the case, you may consider the testimony  
25 of all the witnesses regardless of who may have called them and

D8T6JOH5

Charge

1 all the exhibits received in evidence regardless of who may  
2 have introduced them.

3 That's it, folks, for the first portion. Let me go on  
4 to the claims in this case.

5 In this case, the plaintiff Brandi Johnson brings  
6 claims for employment discrimination on the basis of her race  
7 and gender in violation of Section 1981 of Title 14 of the  
8 United States Code and the New York City Human Rights Law.  
9 Section 1981 makes it unlawful for an employer to discriminate  
10 against an employee on account of her race. The New York City  
11 Human Rights Law makes it unlawful for an employer to  
12 discriminate on the basis of gender or race. Specifically the  
13 plaintiff alleges that she was subject to a hostile work  
14 environment and was terminated from her employment at Strive  
15 East Harlem Employment Group because of her race and gender.  
16 The plaintiff also alleges that she was subjected to a hostile  
17 work environment and was terminated in retaliation for  
18 complaining about race and gender discrimination.

19 Plaintiff seeks compensatory and punitive damages  
20 under both these statutes. The defendants deny the allegations  
21 and contend that the plaintiff was not subjected to a hostile  
22 work environment because of her race, gender or in retaliation  
23 for her discrimination. The defendants also contend that the  
24 plaintiff was terminated because the federal grant funding her  
25 position had expired and that the decision to terminate the

D8T6JOH5

Charge

1 plaintiff had nothing to do with plaintiff's race, gender or  
2 her discrimination complaints.

3 In addition to the defendant's organization, STRIVE,  
4 plaintiff has also named three individual defendants -- Rob  
5 Carmona, Phil Weinberg and Lisa Stein. For any of these  
6 individual defendants to be personally liable on any of the  
7 plaintiff's claims, they must have been personally involved in  
8 or personally participated in the discriminatory conduct  
9 against the plaintiff, if any, you find. Personal involvement  
10 includes not only direct participation in the alleged violation  
11 but also gross negligence in the supervision of subordinates  
12 who committed the wrongful acts and failure to take action upon  
13 receiving information that discrimination was occurring. In  
14 considering the defendant's liability, you must consider each  
15 defendant separately.

16 Hostile work environment. As you heard this morning  
17 there are separate claims. We're going to go through each  
18 claim separately. The plaintiff contends that the  
19 discriminatory employment action taken against her created what  
20 is called a hostile work environment. For the plaintiff to  
21 succeed against the individual defendants on this claim, she  
22 must prove the following by a preponderance of the evidence:  
23 One, that the plaintiff was subjected to unwanted treatment by  
24 a STRIVE employee; number two, that the unwanted treatment was  
25 motivated at least in part by the plaintiff's gender, race or

D8T6JOH5

Charge

1 the by the plaintiff having complained of gender or racial  
2 discrimination. Again, you must consider each defendant's  
3 personal involvement separately. With respect to the claim  
4 asserted against STRIVE, the plaintiff must prove. One and two  
5 above, and I will read them to you again. The plaintiff was  
6 subjected to unwanted treatment by a STRIVE employee and two  
7 the unwanted treatment was motivated at least in part by the  
8 plaintiff's gender, race or by the plaintiff's having  
9 complained of gender or racial discrimination.

10 In addition, with respect to STRIVE, the plaintiff  
11 must also prove one of the following three elements: That  
12 STRIVE's managerial or supervisory employees participated in  
13 the unwanted treatment or that STRIVE knew of its employee's  
14 discriminatory conduct and acquiescenced in such conduct or  
15 failed to take immediate and appropriate corrective action, or  
16 three that STRIVE should have known of its employee's  
17 discriminatory conduct and failed to exercise reasonable  
18 diligence to prevent such conduct.

19 STRIVE is deemed to have knowledge of its employees'  
20 discriminatory conduct where that conduct was known by its  
21 managerial or supervisory employees. If, and only if, you find  
22 that the plaintiff has met her burden on each of the requisite  
23 elements and plaintiff has proved each by a preponderance of  
24 the evidence, then you may turn to the defendants' affirmative  
25 defenses for which the defendants have the burden of proof.

D8T6JOH5

Charge

1 Not the plaintiff. They must prove them by a preponderance of  
2 the evidence. The defendants' affirmative defenses in  
3 substance are that the unwanted treatment complained of by the  
4 plaintiff consisted nothing more than what a reasonable victim  
5 of discrimination would consider petty slights or trivial  
6 inconveniences if proved by a preponderance of the evidence,  
7 your verdict must be for defendants on this claim. If you  
8 determine that the defendants have failed to prove that the  
9 unwanted treatment was nothing more than petty slights or  
10 trivial inconveniences, your verdict must be for the plaintiff  
11 on this claim. That is assuming that the plaintiff has proven  
12 her elements by a preponderance of the evidence so that you  
13 reach the affirmative defense.

14 Discriminatory termination. The plaintiff also  
15 contends that she was terminated because of her race or gender.  
16 For this claim there is only one issue genuinely in dispute and  
17 therefore only one issue you must decide. That is, whether the  
18 plaintiff has proved by a preponderance of the evidence that  
19 the plaintiff's race or gender were motivating factors in her  
20 determination. Plaintiff is not required to prove that the  
21 defendants terminated her solely or primarily because of her  
22 race or gender, but the plaintiff must prove by a preponderance  
23 of the evidence that conscious consideration to race or gender  
24 played at least some part in the decision so terminate her.

25 The defendants have offered evidence that while



D8T6JOH5

Charge

1 plaintiff was terminated, it was entirely for nondiscriminatory  
2 reasons. On this score, keep in mind that an employer may take  
3 adverse action against an employee for a whole host of reasons,  
4 good or bad, so long as it is not discriminatory. So when you  
5 consider the evidence of whether reasons advanced by the  
6 defendants is the true reason for the plaintiff's  
7 determination, the question is not whether the defendant showed  
8 poor or erroneous judgment, you may not judge the defendants'  
9 business decision or second guess the defendants' business  
10 decision. Your role to examine the reason the defendants  
11 advanced just as you would any other evidence.

12 If you find that the defendants' reasons were in fact  
13 pretextual -- I think we talk a little bit about this during  
14 the trial -- or put another way that if the truth be known they  
15 were not the real reasons for the decision then you may but  
16 need not infer that they were made up simply to conceal gender  
17 or race discrimination. Keep in mind that direct evidence of  
18 the discriminatory intent is not always easy to prove and the  
19 plaintiff need only show facts that give rise to a inference  
20 that is circumstantial evidence that the plaintiff's gender or  
21 race motivated or contributed to the defendant's decision.

22 Retaliation. Plaintiff also contends that the  
23 defendants retaliated against her for her complaining about  
24 gender and race discrimination at STRIVE. Opposing  
25 discrimination in employment is a protected activity that's

D8T6JOH5

Charge

1 part of the statute, but we'll go through those elements.  
2 Accordingly, to make out her claim of retaliation the plaintiff  
3 must prove by a preponderance of the evidence each of the  
4 following elements: One, she complained of discrimination in  
5 employment at STRIVE, due to gender or race. Two, the  
6 defendants were aware of her complaint. Three, the plaintiff  
7 was then subjected to conduct that was reasonably likely to  
8 deter a person from engaging in protected activity. Four, that  
9 this conduct was motivated at least in part by the plaintiff's  
10 complaint.

11 The plaintiff must have complained of discrimination  
12 based on a reasonable and good faith belief that she  
13 experienced gender or race discrimination. To succeed on this  
14 claim the plaintiff is not required to prove that the conduct  
15 complained of was in fact gender or race discrimination. What  
16 she must prove, however, is that it was reasonable for her to  
17 believe and in fact she truly believed that the underlying  
18 conduct that she opposed was unlawful gender or race  
19 discrimination. Again, you may not second guess whether the  
20 defendants made the right decision when the plaintiff was  
21 terminated. In other words, you may not substitute your  
22 judgment for that of the defendants'. Your job is to determine  
23 whether the action taken was retaliatory or not.

24 That is the second part. Well, I guess damages comes  
25 into the second part actually. So we're still in the second

D8T6JOH5

Charge

1 part.

2 If you find in favor of the plaintiff, under the law  
3 as I have explained it to you then you must determine the  
4 damages to which he is entitled. However, you should not infer  
5 that the plaintiff is entitled to her to recover damages merely  
6 because I am instruct you on the element of damages. I am  
7 telling you about damages now simply so that should you reach  
8 that juncture, I don't have to bring you back be talk to you  
9 about damages separately a second time.

10 Again, let me remind you that it is the quality not  
11 the quantity of the credible evidence that counts. The purpose  
12 of the law of damages is to award as far as possible just and  
13 fair compensation for the loss, if any, which resulted from the  
14 defendant's violation of the plaintiff's rights. These are  
15 known as compensatory damages. Put another way, compensatory  
16 damages seek to make the plaintiff whole that is to compensate  
17 her for the damage she suffered. Compensatory damages are not  
18 limited merely to expenses that the plaintiff may have borne,  
19 but keep in mind you may not award damages more than once for  
20 the same injury. For example, if the plaintiff were to prevail  
21 on two different theories and establish a \$1 injury, you are  
22 not permitted to award the plaintiff \$1 on each theory.

23 The plaintiff is not entitled to recover more than you  
24 determine she has lost. If you find in favor of the plaintiff,  
25 then you must reward her such sums as you find by the

D8T6JOH5

Charge

1 preponderance of the evidence will fairly and justly compensate  
2 the plaintiff for any damages you find she sustained as a  
3 direct result of the defendants' unlawful conduct. Plaintiff's  
4 claim to damages includes two distinct types of damages and you  
5 must consider them separately. First, you must determine the  
6 amount of wages and fringe benefits if any that the plaintiff  
7 would have earned if she had not been terminated. You may  
8 award damages only for harm suffered by the plaintiff for the  
9 period following the termination. These may include back pay,  
10 which is the amount of damages or lost earnings, through the  
11 date of your verdict. When considering back pay, you are to  
12 take the plaintiff's reduced earnings and her new employment  
13 into consideration. As with any aspect of damages back pay  
14 cannot be awarded on speculation or guesswork.

15           Second, you must determine the amount of any pain and  
16 suffering damages sustained by plaintiff such as mental  
17 anguish, future pecuniary losses, emotional pain, suffering,  
18 inconvenience or loss of enjoyment of life. However, where  
19 there is only limited evidence presented of mental anguish or  
20 damages for pain and suffering could be nominal or zero even if  
21 cases even where discrimination or retaliation is found. In  
22 awarding compensatory damages, if you decide to award any, you  
23 must be guided by dispassionate common sense. Computing  
24 damages may be difficult, but you must not let that difficulty  
25 lead you to engage in speculation or arbitrary guesswork. On

D8T6JOH5

Charge

1 the other hand, the law does not require the plaintiff to prove  
2 the amount of her losses with mathematical precision but only  
3 with as much definitiveness and accuracy as the circumstances  
4 permit. In all instances you are to use your sound discretion  
5 in fixing an award of damages, drawing reasonable differences  
6 where you deem appropriate from the facts and circumstances in  
7 evidence.

8 Burden of proof to show the damages were sustained is  
9 on the plaintiff. Plaintiff must prove her damages or if the  
10 damages she sustained by a preponderance of the evidence of the  
11 credible evidence. Do not add an amount for interest. This  
12 will be automatic calculated by me after you reach your  
13 verdict.

14 Normal damages. If you return a verdict for the  
15 plaintiff but you find that the plaintiff's damages has no  
16 monetary value and therefore she is not entitled to  
17 compensatory damages, you may award nominal damages of up to  
18 \$1. Nominal damages are designed to acknowledge the  
19 depravation of a protected right even when no actual injury  
20 occurred. You should not award nominal damages out of sympathy  
21 for the plaintiff if you believe that the plaintiff has failed  
22 to prove her case.

23 Punitive damages. In addition to compensatory damages  
24 and nominal damages, the law permits the jury under limited  
25 circumstances to award an injured party, person of punitive

D8T6JOH5

Charge

1 damages. If you find that one or more defendants discriminated  
2 or retaliated against the plaintiff, then you must decide  
3 whether the defendants acted with malice or with reckless  
4 indifference of the plaintiff's rights. Malice is defined as  
5 the intent without justification or excuse to commit a wrongful  
6 act. Reckless difference is defined as the conscious disregard  
7 of a harm that one's action could do the interest or rights of  
8 another.

9 If you find that the defendants acted with malice or  
10 reckless disregard then in addition to any actual or nominal  
11 damages to which you find the plaintiff is entitled, you may  
12 but are not required to award the plaintiff an additional  
13 amount as punitive damages if you find that it is appropriate  
14 to punish the defendants or to deter the defendants from  
15 similar conduct in the future. The amount of punitive damages  
16 is something we can decide at a later hearing. Your verdict  
17 sheet which you will get at time you enter on to your  
18 deliberations will just have a line and a yes or a no for that  
19 item.

20 Now we're at part three, deliberations. Juror  
21 conduct. You are to conduct your deliberations in an  
22 atmosphere of complete fairness and impartiality without bias  
23 for or against the plaintiff or the defendants. This case  
24 should be considered and decided by you as an action between  
25 parties of equal standing in the community. No party, whether

D8T6JOH5

Charge

1 an individual or an organization, is entitled to sympathy or  
2 favor. It would be improper for you to consider any personal  
3 feelings you may have about one of the party's race, religion,  
4 national origin, sex or age. It would be equally improper for  
5 to you allow any feelings you might have about the nature of  
6 the claim to influence you in any way.

7 Parties in this case are entitled to a trial free from  
8 prejudice. You must reach your verdict through a fair and  
9 impartial consideration of the evidence.

10 The case will be decided on the basis answers that you  
11 give to certain questions, which will be on a verdict sheet,  
12 which I indicated will be given to you when we're finished. In  
13 this thought the jury must be unanimous. When all of you have  
14 agreed on any answer, the foreperson or the jury will write the  
15 answer in the space provided. When you have answered requisite  
16 question, the foreperson will sign the verdict sheet and signal  
17 the marshal that you are ready to report your verdict to the  
18 Court and the foreperson will be taken through the verdict  
19 sheet by my courtroom deputy. Do not assume from the questions  
20 or from the wording of the questions or from my instruction  
21 about them what the answers should be or any view I might have  
22 about what the answers should be. Again, I have no power to  
23 tell you what the answers should be.

24 It is your duty as jurors to consult with one another  
25 and to deliberate with a view to reaching an agreement. Each

D8T6JOH5

Charge

1 of you has decided case for himself or herself but you should  
2 do so only after a consideration of the case with from your  
3 fellow jurors. You should not hesitate to change an opinion  
4 when convinced that it is erroneous. You are not bound to  
5 surrender your honest convictions concerning the effect or  
6 weight of the evidence for the mere of purpose of returning a  
7 verdict based on opinion of other jurors. Discuss and weigh  
8 your opinions dispassionately without regard to prejudice or  
9 favor for either party and adopt that conclusion, which in your  
10 good conscious appears to be in accordance with the truth.

11 Once you get into the jury room, your foreperson,  
12 Juror No. 1, unless you agree on another, will be responsible  
13 for signing any and all communications to the Court and to  
14 handing them to the marshal during your deliberations.

15 If during your deliberations you want to see any of  
16 the exhibits, you may consider that they be brought to you in  
17 the jury room. If you want any testimony read back, you may  
18 also request that. Remember that it is not always easy to  
19 locate what you might want so be as specific as you possibly  
20 can and if you request a portion let me know the witness,  
21 subject matter and if possible whether it is direct or cross or  
22 both that you desire.

23 In addition, you may request a portion or all of my  
24 instructions on the law. Your request for exhibits or  
25 testimony or my instructions, in fact, any communication with



D8T6JOH5

Charge

1 the Court should be made to me in writing signed by the  
2 foreperson and given to me by one the marshals. In any event,  
3 do not tell me or anyone else how you, the jury, stands on any  
4 issue until a unanimous verdict should be reached.

5 I think that is the complete charge.

6 Wait one second. Somebody is looking over my  
7 shoulder. Let me see. There is a last sentence on punitive  
8 damages that I totally omitted and it read the plaintiff may  
9 recover punitive damages even absent an award of either actual  
10 or nominal damages.

11 Do we have a marshal?

12 THE DEPUTY CLERK: Yes we do.

13 THE COURT: Should we swear him?

14 THE DEPUTY CLERK: Yes, your Honor.

15 THE COURT: Two marshals?

16 THE DEPUTY CLERK: Like two deputies.

17 (Marshal sworn)

18 THE COURT: Very well. You may take them away.

19 (Jury retired to deliberate)  
20  
21  
22  
23  
24  
25

D8T6JOH5

Charge

1 (In open court; jury not present)

2 THE COURT: I have one verdict sheet. Do you have any  
3 other? Before I go, we should go to the side bar and see if  
4 there are additions or corrections for which we have to call  
5 them back and tell them about. As I indicated to you earlier  
6 on I marked all of your requests. Let's get reporter.

7 (Continued on next page)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

D8T6JOH5

Charge

1 (At the side bar)

2 THE COURT: I have marked, and I think I went through  
3 this yesterday as well, the defendants; request to jury  
4 instructions as Court Exhibit A, Plaintiff's requested jury  
5 instructions as Exhibit B, Defendants' proposed verdict sheet  
6 is C, Defendant's proposed verdict sheet as E, and I think that  
7 is all.

8 Anything that is in here that I didn't do in my charge  
9 and that you object to you have an objection.

10 Anything else?

11 MS. MESIDOR: No, your Honor. Not in respect to that.  
12 We just had an inquiry regarding what exactly would your Honor  
13 like for us to do with the evidence. We have compiled all the  
14 evidence.

15 THE COURT: You are talking about exhibits.

16 MS. MESIDOR: Yes, sir.

17 THE COURT: I think you have to wait until they tell  
18 us that they want them.

19 MS. MESIDOR: We compiled everything there as well as  
20 deposition transcript testimony.

21 THE COURT: As long as you are here, you should --

22 MS. MESIDOR: My inquiry is in regards to the  
23 recording, I played everything off of my lap top. I do have  
24 the CD that I can provide. I do not have a clean device other  
25 than my lap to to play the recording for the jurors. However,

D8T6JOH5

Charge

1 I do have a CD that I provided to your Honor and it is  
2 appropriately labeled, but I was not sure whether your Honor  
3 had the capability to actually play the CD.

4 THE COURT: I don't have any capabilities in that  
5 area. That doesn't mean the court doesn't. I have no idea.

6 Do you?

7 THE DEPUTY CLERK: I will check.

8 MS. MESIDOR: I don't have an objection to leaving my  
9 lap top, but there are many, many other things on that lap top  
10 other than the recording.

11 THE COURT: I think that might be in error.

12 MR. MINNAH-DONKOH: To the extent the jurors want to  
13 hear the audio recording, it would be played in open court.

14 THE COURT: We can do it in open court, but we can  
15 also send it in. There is no reason why we have to sit here  
16 and listen -- again. That might be safest way to avoid any  
17 problem.

18 MS. MESIDOR: I agree.

19 THE COURT: They are not that long.

20 MS. MESIDOR: No, they are not.

21 THE COURT: You understand that as I said to the jury  
22 that that is the exhibit. I think of you have to pass out the  
23 transcripts if we bring them out which is the way we would do  
24 it if we send it in.

25 MS. MESIDOR: That's correct.

D8T6JOH5

Charge

1 THE COURT: You have them?

2 MS. MESIDOR: Yes, I do, your Honor.

3 THE COURT: Anything else?

4 It was my turn before. With respect to the exhibits,  
5 they should be cataloged at the back of each transcript what  
6 went into evidence. I just didn't have a chance to look in the  
7 transcripts, but obviously it is only as my rules suggest. You  
8 can only give them what was discussed with a witness. You  
9 cannot give them the hundred.

10 MS. MESIDOR: I understand that, your Honor. The pile  
11 looks large because all the deposition transcripts are there.  
12 So I didn't want to just pick and choose from the record.

13 MS. KREBS: Your Honor, the deposition transcripts are  
14 not in evidence and wouldn't be shown anyway?

15 MS. MESIDOR: Right.

16 THE COURT: They are not in the pile?

17 MS. MESIDOR: We are not presenting the deposition  
18 transcripts as though they are part of the evidence, but to the  
19 extent the record may refer --

20 THE COURT: I have the official transcript.

21 MS. MESIDOR: Understood.

22 THE COURT: We'll work out what we need to give them.

23 MS. KREBS: I was confused, your Honor.

24 THE COURT: I don't believe that.

25 MS. KREBS: Because the trial transcript contains the

D8T6JOH5

Charge

1 transcription of all the relevant pieces of the deposition  
2 transcript read into the record. So I guess I am not certain  
3 why they would need the deposition transcripts. They would  
4 just need to be read back the portion the trial transcript that  
5 contained the relevant portion of the deposition.

6 THE COURT: When we get to that, that is the way we'll  
7 handle it.

8 MS. KREBS: Thank you.

9 MS. MESIDOR: Our pulling them is not indicative that  
10 they should be substituted.

11 THE COURT: No. I see the pile.

12 MS. MESIDOR: Your Honor, one other matter. Now that  
13 the jurors are going into deliberation, I guess it is more of a  
14 procedural question, at what point are the alternates excused?

15 THE COURT: I want you to understand, as I thought I  
16 did at the beginning, but there has been a lot of water under  
17 the dam. In the state court the alternates are dismissed.

18 MS. MESIDOR: Right.

19 THE COURT: And indeed they could have a verdict of  
20 5-1 as I recall those days in the Medieval times, but in any  
21 event here both unanimity and all the people who were impaneled  
22 deliberate just like ordinary full fledged jurors.

23 MS. MESIDOR: Understood.

24 THE COURT: Anything else?

25 MS. MESIDOR: No, your Honor. Thank you.

D8T6JOH5

Charge

1           THE COURT: Believe it or not, I have a 3:00 problem  
2 just like I had a 1:00 problem. I am going to try to get  
3 something to eat, but you are all going to be here, right?

4           MS. KREBS: Yes. I apologize when I came into the  
5 back into the courtroom at 1:15 when you told us to be back,  
6 the marshal said you said 1:45.

7           THE DEPUTY CLERK: They were mistaken.

8           MS. KREBS: I apologize.

9           THE COURT: I explained so that they were all happy  
10 that you came at all.

11          MS. KREBS: Wonderful, your Honor.

12          MS. MESIDOR: Thank you, Judge.

13          (Recess pending verdict)

14

15

16

17

18

19

20

21

22

23

24

25

D8T6JOH5

Charge

1 THE COURT: We received a not from the jury.

2 Dear Judge Baer, we have a question about Question No.  
3 4. We would like to know if we decide to give compensatory  
4 damages to the plaintiff what amount do we allocate for monthly  
5 benefits as well as pain and suffering?

6 Both the plaintiff and defendant is welcome to look at  
7 this note and tell me what it is that you think we should do  
8 with it, Court exhibit G. In any event, my view is simply we  
9 tell them that this is a single sum that they ought to put in  
10 that line. I have no idea where they got the word "monthly"  
11 from.

12 MS. MESIDOR: Monthly benefits.

13 THE COURT: Do you talk about that?

14 MS. MESIDOR: No.

15 THE COURT: Do you see that in No. 4?

16 MS. MESIDOR: No, your Honor. I think they are just  
17 trying to be thorough.

18 THE COURT: Thorough? Whatever.

19 MS. MESIDOR: Our view would be that is something that  
20 is up to them.

21 MS. KREBS: Based on whatever evidence has already  
22 been presented, they can rely on what evidence has been  
23 presented and they have to come to a decision on their own.

24 THE DEPUTY CLERK: Jury entering.

25 (In open court; jury present)



D8T6JOH5

Charge

1 THE DEPUTY CLERK: Please be seated.

2 THE COURT: I have your note, which I read into the  
3 record and all I can tell you, and I think all counsel has  
4 suggested, is that you have heard all of the evidence and to  
5 our recollection this is a question that calls for a single  
6 dollar amount. I don't know where the word "monthly" came  
7 from. I don't care. It is nice that you are working, but the  
8 fact it just calls for a single number. You are excused.

9 (Jury deliberations continued)

10 (Continued on next page)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

D8T6JOH5

Charge

1 THE COURT: I guess they will want a long Labor Day  
2 weekend. We'll see you shortly. That didn't take long, right?

3 (Recess pending verdict)

4 THE MARSHAL: All rise.

5 THE DEPUTY CLERK: Please be seated everyone.

6 THE COURT: Exhibit H, which as we may as well put on  
7 record, reads: We have come to a verdict, and it is signed by  
8 the foreperson.

9 Mr. Foreperson, I gather that you have reached a  
10 verdict?

11 THE FOREPERSON: Yes.

12 THE COURT: My clerk will take you through it.

13 Well, I don't have one then, but I guess you don't  
14 care.

15 THE DEPUTY CLERK: Brandi Johnson v. STRIVE, Lisa  
16 Stein, Rob Carmona and Phil Weinberg.

17 One: Did the plaintiff prove by a preponderance of  
18 the evidence that any of the following defendants subjected her  
19 to a hostile work environment in accordance with required  
20 finding as set forth in my charge.

21 Rob Carmona?

22 THE FOREPERSON: Yes.

23 THE DEPUTY CLERK: Phil Weinberg?

24 THE FOREPERSON: No.

25 THE DEPUTY CLERK: Lisa Stein.

D8T6JOH5

Charge

1 THE FOREPERSON: No.

2 THE DEPUTY CLERK: STRIVE East Harlem?

3 THE FOREPERSON: Yes.

4 THE COURT: Two: Did the plaintiff prove by a  
5 preponderance of the evidence that any of the following  
6 defendants intentionally discriminated against her because of  
7 her gender or race when STRIVE East Harlem Group terminated her  
8 employment, Rob Carmona?

9 THE FOREPERSON: Yes.

10 THE DEPUTY CLERK: Phil Weinberg?

11 THE FOREPERSON: No.

12 THE DEPUTY CLERK: Lisa Stein?

13 THE FOREPERSON: No.

14 THE DEPUTY CLERK: STRIVE East Harlem?

15 THE FOREPERSON: Yes.

16 THE DEPUTY CLERK: Three, did the plaintiff prove by a  
17 preponderance of the evidence that any of the following  
18 defendants retaliated against her because of her complaints of  
19 gender or race discrimination in accordance with the required  
20 findings as set forth in my charge, Rob Carmona?

21 THE FOREPERSON: Yes.

22 THE DEPUTY CLERK: Phil Weinberg?

23 THE FOREPERSON: No.

24 THE DEPUTY CLERK: Lisa Stein?

25 THE FOREPERSON: No.

D8T6JOH5

Charge

1 THE DEPUTY CLERK: STRIVE East Harlem?

2 THE FOREPERSON: Yes.

3 THE COURT: Four, what amount of compensatory damages,  
4 if any, did the plaintiff prove by a preponderance of the  
5 evidence?

6 THE FOREPERSON: \$250,000.

7 THE DEPUTY CLERK: Five, if you found no compensatory  
8 damage amount, did it exceed 1 dollar?

9 THE FOREPERSON: We did not.

10 THE DEPUTY CLERK: Did you find the plaintiff has to  
11 provide by a preponderance of the evidence that she is entitled  
12 to punitive damages?

13 THE FOREPERSON: Yes.

14 THE COURT: Thank you.

15 THE DEPUTY CLERK: Jury is unanimous signed by the  
16 foreperson, Judge.

17 THE COURT: Thank you very much. I think if we need  
18 to have a hearing with respect to punitives, it will simply be  
19 a question of what it is that there is in the way of resources  
20 that are available. It should not take long, but I certainly  
21 would like to have the same jury. Unless we find another way  
22 to resolve it, maybe we ought to agree that we'll see you again  
23 come Tuesday morning at 10:00. Does that sound like something  
24 you can all provide us with in the way of time? It will take  
25 no great lenth of time. It is not like a three-day trial. So

D8T6JOH5

Charge

1 we'll expect to see you hear having concluded as you did that  
2 punitives are appropriate. But as I say it really has to do  
3 with the wherewithal of the defendants that you found liable.  
4 So it shouldn't take too long.

5 I thank you for having gone through all of this and  
6 sat here and been punctual and attentive throughout. We will  
7 see you Tuesday morning for no more than a couple hours at the  
8 most. Have a good Labor Day weekend. If there are any of you  
9 who have a grave problem planning to take the day off or the  
10 week, you ought to tell me now because I don't want to  
11 inconvenience you. We can do it the following week. It is not  
12 likely you will forget. It is not likely you will hear much of  
13 what you heard. If you are all game, I am game to join you.  
14 We'll see you on Tuesday at 10:00.

15 MS. KREBS: Excuse me, your Honor.

16 THE COURT: You want to poll the jury. Good idea.

17 MS. KREBS: Thank you, your Honor.

18 (Jury polled; each juror answered in the affirmative)

19 THE COURT: See you Tuesday.

20 (Jury excused)

21 THE COURT: This is essentially a problem for the  
22 defendant. I am not sure what we can do here altogether with  
23 punitives. I suppose you better get together whatever it is  
24 that STRIVE and the Mr. Carmona have in the way of assets and  
25 we'll see what they can testify to on Tuesday.

D8T6JOH5

Charge

1 See you then.

2 (Adjourned to September 3 at 10:00 a.m.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25